MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 27 TO DECEMBER 27, 1918.

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SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
RUSSELL C. OSTRANDER, LANSING, . .	Dec. 31, 1919

ASSOCIATE JUSTICES.

JOHN E. BIRD, ADRIAN, ...	Dec. 31, 1919
JOSEPH B. MOORE, LAPEER, ...	Dec. 31, 1921
JOSEPH H. STEERE, SAULT STE. MARIE, .	Dec. 31, 1921
FLAVIUS L. BROOKE, DETROIT, . . .	Dec. 31, 1923
GRANT FELLOWS, HUDSON, ...	Dec. 31, 1923
JOHN W. STONE, MARQUETTE, ...	Dec. 31, 1925
FRANZ C. KUHN, MT. CLEMENS, . . .	Dec. 31, 1925

CLERK—JAY MERTZ, LANSING.

CRIER—ANDREW B. CHAPIN, LANSING.

ATTORNEY GENERAL—ALEX. J. GROESBECK, DETROIT.

The residences of the judges, given above, are as of the date of their election.

CIRCUIT JUDGES.

1.	GUY M. CHESTER,	HILLSDALE.
2.	CHARLES E. WHITE,	NILES.
3.	ALFRED J. MURPHY, GEORGE S. HOSMER, HENRY M. MANDELL, GEORGE P. CODD, CLYDE I. WEBSTER, HARRY J. DINGEMAN,	DETROIT.
4.	JAMES A. PARKINSON, BENJAMIN WILLIAMS,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	KLEBER P. ROCKWELL,	PONTIAC.
7.	EDWARD D. BLACK, FRED W. BRENNAN,	FLINT.
8.	FRANK D. M. DAVIS	IONIA.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	ERNEST A. SNOW, CLARENCE M. BROWN,	SAGINAW.
11.	LOUIS H. FEAD,	NEWBERRY.
12.	PATRICK H. O'BRIEN,	HOUGHTON.
13.	FREDERICK W. MAYNE,	CHARLEVOIX.
14.	JOHN VANDERWERP,	MUSKEGON.
15.	FREDERICK W. KNOWLEN,	CONSTANTINE.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, JOHN S. McDONALD WILLIAM B. BROWN,	GRAND RAPIDS.
18.	SAMUEL G. HOUGHTON,	BAY CITY.
19.	HAL. L. CUTLER,	LUTHER.
20.	ORIEN M. CROSS,	ALLEGAN.
21.	RAY HART,	MIDLAND.
22.	GEORGE W. SAMPLE,	ANN ARBOR.
23.	ALBERT WIDDIS	TAWAS CITY.
24.	WATSON BEACH,	LEXINGTON.
25.	RICHARD C. FLANNIGAN,	NORWAY.
26.	FRANK EMERICK,	ALPENA.
27.	JOSEPH BARTON,	BIG RAPIDS.
28.	FRED S. LAMB,	CADILLAC.

29.	EDWARD J. MOINET,	ST. JOHNS.
30.	HOWARD WIEST,	LANSING.
	CHARLES B. COLLINGWOOD,	EAST LANSING.
31.	EUGENE F. LAW,	PORT HURON.
	HARVEY TAPPAN,	
32.	GEORGE O. DRISCOLL,	IRONWOOD.
33.	FRANK SHEPHERD,	CHEBOYGAN.
34.	NELSON SHARPE,	WEST BRANCH.
35.	JOSEPH H. COLLINS,	CORUNNA.
36.	L. BURGET DES VOIGNES,	CASSOPOLIS.
37.	WALTER H. NORTH,	BATTLE CREEK.
38.	JESSE H. ROOT,	MONROE.
39.	BURTON L. HART,	ADRIAN.
40.	WILLIAM B. WILLIAMS,	LAPEER.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

CHARLES T. WILKINS, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, MAJOR L. DUNHAM.

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89 CASES.

TABLE OF CASES CITED.

LAWS CITED AND CONSTRUED.

SESSION LAWS—Continued.

CIRCUIT COURT RULES.

JUNE TERM, 1918.*

TUTTLE *v.* DOTY.

1. DEEDS—REFORMATION OF INSTRUMENTS.
   On a bill to reform and correct a deed from plaintiff to her daughter, the decree of the court below excepting from the operation of said deed the interest of a grandson, in which grantor had only a life estate, will be affirmed, on appeal.

2. SAME—DELIVERY—VALIDITY.
   As to the interest of grantor to which she had an absolute title, evidence *held*, to establish by a clear preponderance, that the deed was knowingly made and its delivery authorized by grantor, and therefore valid.

3. GIFTS—MISTAKE—CONSIDERATION.
   Where certain certificates of stock were given by plaintiff to her daughter without any consideration, and both were proceeding upon the theory that they had been stolen by a grandson of plaintiff, which later proved to be unfounded, the decree of the court below ordering the surrender of said certificates will be affirmed.

Appeal from Kent; Searl, J., presiding. Submitted April 23, 1918. (Docket No. 58.) Decided September 27, 1918.

Bill by S. Porter Tuttle, executor of the last will of Mary G. Pearsall, deceased, against Fannie E. Doty, individually and as special administratrix of the estate of Payson M. Doty, deceased, to set aside a deed and to enjoin the disposition of certain corporate stock. From the decree rendered, all parties appeal. Affirmed.

*Continued from Vol. 202.

Taggart & Kingston (*E. A. Maher,* of counsel), for plaintiff.

Charles E. Ward, for defendants.

MOORE, J. The trial judge stated in a written opinion filed by him the question involved in this litigation as follows:

"In the first of the above entitled cases, complainant filed her bill in her individual capacity praying that a certain deed purporting to have been executed by her on January 23d, 1899, to defendant Fannie E. Doty be set aside and also for an injunction against both defendants preventing them from disposing of certain bank stocks and telephone stocks which had disappeared and which she charged were wrongfully in the possession of said defendants.

"An amendment to this bill subsequently filed charges that defendant Fannie claimed to have certain written transfers of said stock and that complainant had no knowledge of ever having executed the same, but that if she did, it was because of undue influence and fraud and conspiracy upon the part of the said defendants.

"To this bill defendants answered that said deed was made voluntarily and delivered to defendant Fannie and denying all charges of fraud, undue influence and conspiracy and alleging that the tangible evidence of ownership of said stock was in the hands of said defendant Fannie.

"The issue thus made came on to be heard before the court and after said hearing and before decision thereon it was stipulated that the two cases should be heard together and thereafter testimony was taken in the other case.

"In this latter case complainant who filed her bill in her individual capacity and as executrix of the estate of Orlando K. Pearsall, charged substantially the same facts as in her former bill and addition thereto other fraudulent acts upon the part of defendants Payson M. and Fannie E. Doty, and also named as defendants Orland H. Pearsall and Harvey E. Hill and Sarah E. Hill.

"In the last case a supplemental bill was afterwards filed by complainant, answers were filed by defendants, Payson M. and Fannie E. Doty, and Orland H. Pearsall, and a cross-bill and a supplemental cross-bill filed by Orland H. Pearsall to which answers were also filed. The defendants Harvey E. and Sarah E. Hill, disclaimed any interest in the property and no claim is made that they have any.

"In the first case complainant sets up that she had made another deed to her daughter Fannie E. Doty covering what is known as the property on Smith's Addition, but she did not in that case ask to have that deed set aside or annulled in any way. But in the last case she charges that this deed was made under a mistaken notion upon her part that it was her duty to pay all of a certain paving tax, whereas she being a life tenant as to one-half the property it was her duty to pay half only of said tax and that the deed was made in order to raise money to pay said tax and she prays that an accounting may be had of the moneys paid by the Dotys on account of said taxes and of the rents received by them and that this deed also may be set aside.

"Orland H. Pearsall, admitting all the allegations of complainant's bill, prays in his cross-bill for the same relief as to his interest and for the removal of his mother, Fannie E., as trustee under the will of Orlando K. Pearsall and for relief as to his interest in such of the stocks as belonged to the estate.

"Complainant, an old lady of the age of 89 years, is the widow of Orlando K. Pearsall, who died May 9, 1891, leaving a will by which he disposed of all of the property involved in these cases except certain of the stocks which belonged to the complainant in her own right. This will provided that his entire estate, real and personal, should be disposed of as follows: One-half to his widow absolutely and the use of the other half during her lifetime; and after the death of the widow the daughter, Fannie E. Doty, to receive one-half of this remainder, being one-quarter of the estate, absolutely, and the other quarter of the estate to be held in trust by Fannie E. for the use and benefit of Orland H., a son of Fannie E. by a former marriage, for and during his life, and after

his death to go to his children or grandchildren, if any, and if none, then to his mother, if living, and if not, then to her children or grandchildren, if any, and if none, then to the then living brothers and sisters of the testator.

"The will named the widow as executrix and one John T. Gould (since deceased) as executor and empowered them to sell and convert into money all of said real and personal property in order that the widow might enjoy the income therefrom.

"In disposing of the questions presented, it will be necessary to consider the case first as to the property owned individually by complainant and second that which still remained as part of the estate.

"As to the stocks owned by complainant in her own right and as to her half of the other stocks and of the real estate coming to her absolutely under the will, she had full power of disposal and if she voluntarily and without exercise of undue influence or fraud gave it away and made such delivery of the deed and evidences of title as are sufficient in law, then she cannot be heard to complain in a court of equity.

"The evidence shows that some time prior to the making of any of these deeds and other papers the complainant became alarmed because of the fact that a book agent had secured her signature to some paper which she thought might turn out to be a note or a paper upon which some claim could be made against her property, and while there is no evidence to warrant the conclusion that the book agent transaction was the result of a plot to so work upon the mind of this old lady as to bring about the first conveyance to the daughter, yet in view of many other peculiar things which afterwards happened, there is at least a chance for a strong suspicion to that effect. But courts cannot decide cases on suspicions, and in this case the evidence shows that this old lady while mentally competent, and shrewd beyond the average woman of her years, voluntarily executed the first deed after being cautioned by Mr. Hamilton not to do so because of any danger from any signature of hers secured by the book agent; that she did not at the time make any delivery of it beyond recall and that afterwards she voluntarily ordered Hamilton, in whose

custody it had been left, to deliver it to her daughter, Fannie E. Doty. The deed was read over to her and she fully understood its contents. She retained the use of the property during her lifetime and being then on friendly terms with her daughter placed the title to it exactly where she then declared she wanted it to go. As to this conveyance so far as it affects her individual interest, relief will be denied to complainant.

"But she never ordered the bill of sale to be delivered and the circumstances under which the transfer of the stock was made are such that I think a court of equity could grant relief. It is quite evident that complainant would not have given over this stock to her daughter except for the fact that she believed that it had been stolen from her by the grandson. This the daughter knew."

We find in the record but one decree. It reads in part as follows:

"This court by virtue of the authority therein vested doth order, adjudge and decree that the certain deed of conveyance bearing date of the 6th day of December, A. D. 1898, and which was recorded in the office of the register of deeds for the county of Kent, on the 18th day of January, A. D. 1909, in liber 371 of deeds, on page 613, be so corrected and reformed as to except and reserve from the operations of said deed, the use, rents and profits of the premises therein described, during the lifetime of said complainant. * * *

"It is further ordered, adjudged, and decreed that said deed of conveyance and the record thereof be further reformed and corrected so that the same shall apply to and operate as a conveyance only of the remainder in fee of an equal undivided one-half of the premises above described after the expiration of the life estate of said Mary G. Pearsall in said premises, such equal undivided one-half of said premises being that portion of the same given to said Mary G. Pearsall by the second clause of the will of Orlando K. Pearsall, deceased, in the following terms, viz.: * * * Except as above decreed the title of Fanny E. Doty under said deed is hereby confirmed to an equal undi-

vided one-half interest in fee of said premises, subject to the life estate of Mary G. Pearsall therein as aforesaid.

"It is further ordered, adjudged and decreed that the defendant Fannie E. Doty deliver and surrender up to the complainant Mary G. Pearsall * * * certificate No. 1538, issued by the Citizens' Telephone Company of Grand Rapids, Michigan, for 100 shares of $10 each; certificate No. 685 issued by the Grand Rapids National City Bank to said complainant for ten shares of $100 each of its capital stock, said complainant being the sole owner thereof; also that said Fannie E. Doty deliver and surrender up to complainant, Mary G. Pearsall, as executrix of the will of Orlando K. Pearsall upon her filing with the probate court for Kent county a bond in the sum of $2,500 with sureties to be approved by the probate judge of said county certificate No. 75 for 15 shares of $100 each, and certificate No. 144 for five shares of $100 each issued by the Grand Rapids National City Bank to Orlando K. Pearsall."

Since the decree Mary G. Pearsall and Payson M. Doty have died. Their deaths have been suggested of record. Both parties appeal from the decree.

The will of Orlando K. Pearsall had the following provisions:

"*Second:* I give and devise, will and bequeath unto my said wife one undivided one-half of all the rest, residue and remainder of my estate, real, personal and mixed of every name, nature and description of which I may die seized or possessed, the same to be held and enjoyed by her and her heirs and representatives absolutely forever.

"*Third:* The remaining one-half of my said real and personal property I give, bequeath, will and devise unto my said wife, the same to be held and enjoyed by her for and during her natural life.

"*Fourth:* After the death of my said wife, I give and bequeath, will and devise, to my daughter Fannie E. Doty one undivided one-half of all the real and personal estate hereinbefore given to my said wife for and during the life of my said wife; the same to

be held by my said daughter absolutely and to her heirs and legal representatives forever.

"*Fifth:* After the death of my said wife, I give, devise and bequeath unto my said daughter the other undivided one-half of the real and personal estate hereinbefore given to my said wife during her life; the same to be held in trust by my said daughter for the use and benefit of my grandson Orland H. Pearsall, for and during his life, and after the death of my said grandson Orland H. Pearsall it is my will that said shares so as above said willed in trust to my said daughter, rest absolutely in the children or grandchildren of my said grandson." * * *

These provisions of the will are not ambiguous, and it is clear Mrs. Pearsall had no more right to attempt to alienate the interest of Orland H. Pearsall in his grandfather's estate than she would to alienate the interest therein of the daughter Fannie E. Doty, and the decree of the circuit judge in that regard is affirmed.

Did Mrs. Doty acquire by virtue of the paper that was executed in January, 1899, the interest Mrs. Pearsall had in the real estate given to Mrs. Pearsall by the will? This presents questions of fact. Mrs. Pearsall admits she signed a paper which was acknowledged before Charles S. Hilton, but denies she supposed it was a deed and she denies her signature to the deed which is in evidence and says that if it is her signature it was so folded when she signed it that she could not see that it was a deed. She admits on her cross-examination that the object of making the paper was to prevent the agent who had interviewed her and also Mr. Harper, the first husband of her daughter, from getting any interest in her property. She also testified that she signed but one paper which she acknowledged before Mr. Hilton. When Mrs. Pearsall testified she was past 80 and a number of years had intervened since she executed the paper before Mr.

Hilton. This may account for her testimony. The deposition of Mr. Hilton was taken in Seattle 12 years after the paper was acknowledged before him. At the time he gave his testimony he was 69 years of age. We quote from his testimony:

"When I arrived at Mrs. Pearsall's home, Mr. and Mrs. James L. Hamilton, neighbors of Mrs. Pearsall, were there. Then Mrs. Pearsall stated to me what the purport of this paper was in the presence of Mrs. Doty; that she was fearful that Mr. Harper, Mrs. Doty's former husband, would cause her some trouble and that she was making this agreement with her daughter, Mrs. Doty, to protect her and Orley Pearsall, her son, from Mr. Harper. I did not read over the paper that they wished to have me take acknowledgment of. Mrs. Pearsall had the paper in her hand while she was talking and referred to it while doing so. As I now remember it, the paper had been drawn up and was signed and witnessed before I saw it, and was in Mr. Hamilton's handwriting as far as I could see. I then took Mrs. Pearsall's acknowledgment to the paper in the presence of Mr. and Mrs. James L. Hamilton. I did not have the paper in my hands for the purpose of examining it and only had it long enough to take the acknowledgment. I could not see the whole of the contents of the paper signed by Mrs. Pearsall and acknowledged by her before me, as notary public. The paper was not unfolded except enough to enable me to see the signature of Mrs. Pearsall and the jurat or acknowledgment. I never saw the paper except at the time of taking the acknowledgment. After the paper was executed I sat down. A little general conversation followed. As I recollect, Mrs. Pearsall then stated that the paper which she had acknowledged was to be left in the hands of James L. Hamilton and not to be effective until Mrs. Pearsall's death. That Mr. Hamilton was not to deliver it to any one except in the presence of both Mrs. Pearsall and Mrs. Doty, and by their joint consent, nor unless both should be present and agree to it. From the conversation of both Mrs. Pearsall and Mrs. Doty at that time, I understood that the execution of this paper

by Mrs. Pearsall was not to affect Mrs. Pearsall's right, title or interest in the property mentioned in this paper and Mrs. Doty and Mrs. Pearsall each so stated. The paper was not read over to Mrs. Pearsall in my presence before she signed it. She was not very well at the time. She had been very sick but was recovering. She gave as one of her reasons for executing this paper, the fact that she was in poor health and thought best to attend to the matter. The paper was in Mrs. Pearsall's hands when I left the house."

The paper which Mrs. Pearsall acknowledged before Mr. Hilton was a warranty deed on a printed blank in common use and the certificate of acknowledgment signed by Mr. Hilton was in the usual form.

One of the witnesses to the deed was James L. Hamilton. His version is in part as follows:

"*A.* When we reached Mrs. Pearsall's she began telling me about her having signed a paper with some book agent, concerning which she seemed to be considerably worried; she thought they might turn up in some way as a note or something against her, and she said that she had these papers that she wished to execute for the purpose of shutting off or stopping any possible chance of her sustaining a loss in that direction and explained it in that way. I told Mrs. Pearsall at the time that if she was about to execute these papers in fear of any trouble that she would have on account of having signed something that she didn't exactly know what it was with the book agent, that I would certainly advise her not to sign it; and she replied that she wanted to sign them, it was carrying out her wishes in the matter and that this was only incidental. That, in substance, is the conversation.

"*Q.* In other words, that her wish, independent of this matter, was to have it this way?

"*A.* Yes. My advice to her was under no circumstances to sign those papers with any such thought in her mind, if that was the motive.

"*Q.* While Mr. Hilton was there, were you there when Mr. Hilton came?

"*A.* I was.

"*Q.* Was there any talk about this matter in Hilton's presence and hers?

"*A.* There was.

"*Q.* What was the talk there when Hilton was there?

"*A.* I recited to Mrs. Pearsall practically—or to Mr. Hilton practically the conversation between Mrs. Pearsall and I, and told him what my advice to Mrs. Pearsall was in the matter, and he says, 'That is right; there will not be one chance in a thousand of any difficulty.' * * *

"*Q.* What was done with these papers, take the will and the bill of sale and the deed, finally?

"*A.* They were given in my possession to be cared for, taken by me and put in my safe at the office.

"*Q.* Who gave them to you?

"*A.* Mrs. Pearsall.

"*Q.* Did she state any reason why she wanted you to take care of them rather than some one else?

"*A.* I don't think so. I guess it was mutually agreed that I should be the custodian of the papers.

"*Q.* You were to take them and take care of them?

"*A.* Yes.

"*Q.* Did you hear anything more from Mrs. Doty or Mrs. Pearsall about the papers for some time after that?

"*A.* Some time after that Mrs. Hamilton told me that Mrs. Doty had called her up on the telephone and wanted I should deliver to her the deed. I told Mrs. Hamilton that I would not deliver the deed to any one, to either party, without the consent of both parties and that before delivering the deed I would see Mrs. Pearsall and see that it was her wish I should do so.

"*Q.* Now what did you do about seeing Mrs. Pearsall?

"*A.* That night after dinner I went to Mrs. Pearsall's residence. She came to the door; I told her that Mrs. Doty had requested that I deliver to her the deed, and that I had told them that I would not do it without her consent, and asked her if it was agreeable to her that I do it and she said, 'Yes, let Fannie have the paper.' The next day—the paper remained in my safe; the next day I brought it home and delivered it to Mrs. Doty.

"*The Court:* Can you give the date of that?

"*Q.* You have stated there that Fannie wanted the deed delivered. You used the term 'deed'?

"*A.* Yes.

"*Q.* To distinguish it from the other paper?

"*A.* Yes.

"*Q.* Any question about that in your mind about speaking of it as a deed?

"*A.* No, sir; no question at all. I wanted Mrs. Pearsall to know what the paper was and I told her what it was."

Mrs. Hamilton corroborated the material parts of his testimony. Mrs. Pearsall says she authorized him to deliver to Mrs. Doty the paper that was acknowledged before Mr. Hilton, but that she did not then and never had supposed it was a deed.

The original papers are before us. The deed has a number of revenue stamps which are initialed by Mrs. Pearsall. An inspection of the papers and a careful reading of this voluminous record establishes by a clear preponderance of the evidence that Mrs. Pearsall made the deed in question, knowing what it was, and authorized its delivery to Mrs. Doty. We are also satisfied that when the deed was executed a life lease was given back to Mrs. Pearsall.

The will and bill of sale never passed out of the possession of Mr. Hamilton by direction of the parties, and no property interests were affected by them.

We come now to consider the stocks transaction. There is no doubt the conduct of Orland H. Pearsall greatly disturbed his grandmother. A diamond ring had been stolen, which he afterwards confessed he had taken. Other articles had disappeared. Mrs. Pearsall thought her stocks had been stolen by him. Mrs. Doty offered in evidence an exhibit which she says was written by her mother reading:

"GRAND RAPIDS, July 31, '06.

"I have had stolen from my desk in my home one $1,500 stock certificate No. 79, one $500 stock certificate No. 144 of the Grand Rapids National Bank, made

to my husband Orlando K. Pearsall; also one $1,000 certificate No. 685 of the same bank, made out in my own name, Mary G. Pearsall; one $1,000 stock certificate of the Citizens' Telephone Company. I had intended to give to my grandson Orland H. Pearsall, my personal bank stock $1,000; also my $1,000 of the telephone stock, but of late his conduct has been such I have changed my mind, and when these certificates are found I give them all to my daughter, Fannie E. Doty.

"MARY G. PEARSALL."

The following exhibit was offered in evidence by Mrs. Doty:

"GRAND RAPIDS, July 31, 1906.

"*Dear Mother:*

"You having today sold to me, love and affection and one dollar the consideration, certificate of stock 1538 of the Citizens' Telephone Company for $1,000; also certificates of stock No. 79 for $15,000; No. 144 for $500, No. 685 for $1,000 of the Grand Rapids National Bank, and Nos. 79 and 144 being in the name of my father, Orlando K. Pearsall, and No. 685 and 1538 being in your name, the above-mentioned certificates having been stolen from you, as soon as recovered or their duplicates are to be delivered to me; I hereby promise and agree to pay you during your lifetime any and all dividends that may be paid on such shares of stock for your personal use and benefit.

"FANNIE E. DOTY.

"To MRS. MARY G. PEARSALL.

"Accepted, MARY G. PEARSALL."

Notices were given to the telephone company and the bank in which it was recited that the certificates had been stolen.

Mrs. Doty testified that she and her mother both supposed they had been stolen and the inference may be fairly drawn from her testimony that they thought Orland H. Pearsall had taken them. On or about July 31, 1906, Mrs. Pearsall procured a will in which she had given these certificates to Orland H. Pearsall

and the will was burned in the presence of Mrs. Pearsall and Mrs. Doty. As a matter of fact the certificates had not been stolen, but upon an occasion when Mrs. Pearsall was going to California for the winter she had delivered them for safe keeping to Mrs. Doty who put them in her private box in the bank. It is clear her mother had forgotten this and Mrs. Doty testified she had. Later Mrs. Doty found the certificates in her box and produced them on the trial. It is not to her credit that when she found them she did not inform her mother they had been found. Mrs. Doty paid nothing for these stocks, and if her testimony was true her mother and herself were both proceeding upon the theory that they had been stolen when they were given to her. The record indicates that if Mrs. Pearsall had known the facts she would have retained the certificates of stock.

The decree of the court below in regard to the stocks should be affirmed. In view of the fact that we find a life lease was given and the further fact that Mrs. Pearsall is dead, we think it unnecessary to discuss the question raised by counsel whether the trial judge could, as he attempted to do, reform the deed by incorporating therein a life lease. As both parties have appealed no costs in this court will be given to either of them.

The decree is affirmed.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

J. W. WELLS LUMBER CO. *v.* MENOMINEE RIVER BOOM CO.

INJUNCTION — COMITY OF STATES — LOGS AND LOGGING — BOOMAGE CHARGES—EQUITY.

Defendant, a boom company incorporated in both Michigan and Wisconsin, operating on the Menominee river, sued plaintiff, a Michigan corporation, in the Wisconsin courts, to recover boomage and rafting charges upon logs delivered during the seasons of 1908 to 1913, inclusive. Plaintiff answered, setting up alleged excessive charges under the Wisconsin statute upon logs delivered during 1904-1907, by way of counterclaim, to which defendant pleaded the statute of limitations. While said suit was pending plaintiff filed its bill to enjoin defendant from further prosecuting its action in the Wisconsin suit, alleging that its counterclaim is barred in Wisconsin but is not barred in Michigan. *Held*, that plaintiff had failed to show excessive charges for booming and rafting when proper allowance was made for sorting its logs and other legal charges, and that there were no such compelling equities requiring the court to break over the rule of comity and policy which forbids the granting of an injunction to stay proceedings in a suit already begun in a court of competent jurisdiction of a sister State.

Appeal from Menominee; Flannigan, J. Submitted April 24, 1918. (Docket No. 111.) Decided September 27, 1918.

Bill by the J. W. Wells Lumber Company against the Menominee River Boom Company to enjoin an action at law, and for an accounting. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Sawyer & Sawyer (*Martineau & Martineau*, of counsel), for plaintiff.

Fred H. Haggerson (*Upham, Black, Russell & Richardson*, of counsel), for defendant.

MOORE, J. This is an appeal by plaintiff from a decree of the circuit court for Menominee county, dismissing the plaintiff's bill of complaint in a suit to permanently enjoin the defendant from further prosecuting an action begun by it against plaintiff pending in the circuit court for Marinette county, Wisconsin, and for an accounting. The instant case was heard on its merits before Richard C. Flannigan, circuit judge, who filed a written opinion which reads as follows:

"For the purpose of improving the Menominee river and its tributaries, and the driving, sorting, holding and delivery of logs and timber thereon, the Menominee River Boom Company, a Michigan corporation, was organized November 8, 1887, under the provisions of Act No. 91 of the Public Acts of Michigan of 1887. On the same day, and for the same purposes, the Menominee River Boom Company, a Wisconsin corporation, was organized under the provisions of chapter 86 of the Revised Statutes of that State and the acts amendatory thereof. On December 27, 1887, the defendant was organized by consolidation of the Michigan and Wisconsin corporations mentioned, agreeable to the provisions of the Michigan and Wisconsin statutes referred to.

"The defendant has been engaged in the driving, sorting and delivery of logs on the Menominee river continuously since the consolidation. Its principal office was located by its articles at Marinette, Wisconsin, where it has since remained. With the exception of a director, who resided at Menominee, all of its officers and directors reside at Marinette, Wisconsin.

"The defendant succeeded, presumably by purchase, to the river rights and property of the Menominee Manufacturing Company, which theretofore conducted boomage operations on the river.

"The complainant is a Michigan corporation organized for the manufacture of lumber. Its saw-mill is situated on the shore of Green Bay within the limits of the city of Menominee, at which place its principal office is located. The mill of the complainant has

been in operation for a long period of years. Practically all the pine logs sawed at its mill and all the cedar and other floatable timber cut by it in the woods came down the Menominee river and through the boomage ground of the defendant. The acquaintance of its officers with the manner in which the boomage operations have been conducted on the river has been long and familiar. Mr. J. W. Wells, its president, testified to his connection with lumbering operations on the river and familiarity with the booming operations thereon since 1869.

"The boomage grounds of the defendant extend from near the mouth of the river upstream in the neighborhood of a mile. Saw-mills were located at different points on both banks of the river within the limits of the boomage ground, and various other mills, including the complainant's, which received their log supply from the river, were located on the shore of Green Bay.

"When the logs of the various owners, intermingled, reached the head of the boomage ground, it was the practice of the defendant, which is not criticized, to stop them at the mill first encountered, and from the mass separate and deliver into a floating pocket the logs belonging to that mill. As the pockets of the other mills were reached in succession, the same process was repeated, until all logs belonging to the river mills were separated from the mass and delivered. The logs belonging to the shore mills were continued on down to what is called the rafting gap, where they were separated. Afloat on the river below the rafting gap were various pockets, called rafting pockets, into one of which the logs going to a particular shore mill would be run. From these so-called rafting pockets the logs were then taken by the defendant and delivered to each shore mill proprietor, made up in rafts of a size, and so built and secured as to insure their convenient and safe transportation by means of a tug out of the river and over the bay to the mills to which they respectively belonged.

"Previous to 1890, a uniform price, called a 'boomage charge' was made against all logs going through the booming ground, irrespective of the mill to which they were delivered. In that year the uniform rate

was abandoned and a rate was made for each point of delivery. The new rate, which was lowest against the logs first separated and delivered, increased as deliveries were made lower down, until the rafting gap shore mill delivery point was reached, where the price was highest.

"It was the practice of the defendant, in keeping its accounts of the expense attending the separation and delivery of the logs, to pro rate the cost of the delivery of the logs of each proprietor upon all logs in the mass from which they were taken. The removal of the logs of the first proprietor did not, it would seem, materially lessen the expense of separation at the next lower gap, and such expense being pro rated on a less number of logs, it followed necessarily that the charges for the second separation increased, which increase was augmented as the number of logs in the mass was reduced by each successive separation.

"The rates charged by the defendant for delivery of the logs at the various gaps did not necessarily, and were not supposed to, represent the actual cost of the delivery ascertained in the manner mentioned, but were fixed rates for the years in which they were made, which might prove to be more or less than the actual cost of handling the logs in that year. But in arriving at the rates for a given year, the cost of handling the logs at each delivery gap during the preceding years was largely a controlling factor and was taken into account, together with the labor conditions, the estimated number of logs to come down and all other matters bearing on the cost of handling the logs. The practice of discriminating between the different delivery gaps in making up the boomage charges, and its method of arriving at the rate for each gap, was continued by the defendant from 1890 until the decision by the Wisconsin supreme court of *Menominee River Boom Co.* v. *Spies Lumber & Cedar Co.*, October 24, 1911, 147 Wis. 559 (132 N. W. 1118), and without disclosed objection on the part of the complainant or other mill proprietor, until the spring of 1908.

"Notification of the rates for each year was communicated to the log owners by a circular letter signed by the secretary of the defendant. The circular letter

sent out in each of the years to which this controversy relates was the same except as to the rates charged, which differed in different years. Respecting the complainant's logs, the letter proposed, for the charge specified, to separate them from the logs of the other owners and deliver them to the complainant, or its authorized agent, 'at the rafting gaps, made up in ordinary sized rafts.' On the back of the secretary's letter was a printed letter addressed to the defendant, requesting and authorizing it to drive, boom and handle all the logs therein referred to, concurrently with the logs of other owners, upon the terms and stipulations set forth in the secretary's letter, and to deliver the same as the log owner had already directed or might thereafter direct. In blank spaces which were provided the owner was requested to fill in the number of logs banked by him on the Menominee and its tributaries, and then to sign, swear to and forward the letter to the defendant.

"The complainant received from the defendant the usual circular letter specifying the rates to be charged for delivery of its logs in rafts in 1904, 1905, 1906 and 1907, whereupon the number of logs banked by it for floatage to Menominee was filled in, and the printed letter requesting the defendant to sort and deliver them 'on the terms and stipulations' set forth in the defendant's letter, was signed, sworn to and forwarded to the defendant by an authorized officer of the complainant.

"The rate charged for the delivery of the 1904 logs was 58 cents; for the 1905 logs, 68 cents; for the 1906 logs, 80 cents, and for the 1907 logs, 76 cents. The logs which came down in each of those years were sorted and delivered in the manner described, and the rates charged therefor not only were paid by the complainant without protest or objection of any sort, but it took advantage of a 2 per cent discount proposition which the defendant offered its patrons as an inducement to quick settlements.

"The logs owned by the complainant were pine and cedar. The number of each was not given accurately by any witness, but as compared to the pine the number of cedar logs was small. In each of the years mentioned the complainant requested the defendant to

separate its cedar from its pine logs and deliver them separately. With this request the defendant complied. For making the extra separation which compliance with such request entailed no extra charge was made. The right of the complainant to such extra work without extra charge seems to have been considered as covered by the stipulation of the letter mentioned, that delivery was to be made as directed by the complainant.

"In the spring of 1908 the complainant and the Spies Lumber Company, another shore mill proprietor whose logs were delivered as were the complainant's, objected to the rate which was fixed for that year at 80 cents. A large quantity of logs were handled through the rafting gaps that year for the Spies Lumber Company, for which it made payment of the defendant's charges in part, but refused payment of the remainder. To recover the remainder of its charges the defendant brought its suit in Wisconsin, which, as has been related, was finally decided by the supreme court of that State. (*Menominee River Boom Co.* v. *Spies Lumber & Cedar Co., supra.*)

"Briefly stated, the Wisconsin court held the charge for sorting and delivery was limited by the Wisconsin statute to fifty cents per thousand feet; that the charge, whether fifty cents or under, must be uniform, and that uniformity required that the charge be the same against all logs handled in the boomage ground, whether delivered at the first or last gap, or at any gap between.

"The Wisconsin court held further, and correctly, that the obligation placed on the defendant by the statutes of both States, to sort and deliver, for a reasonable and uniform rate, does not require the defendant to raft the logs for transportation on Green Bay, and does not require it to sort a particular kind of logs from the other logs of an owner; and in addition to the fifty-cent rate for sorting and delivering the defendant was entitled to charge a reasonable amount for making the logs up into rafts, and unless it appeared it did the same thing for the other owners without extra charge, it would be entitled to a further additional charge for separating the cedar from the other logs of the same owner.

"The defendant does not claim it is entitled to charge for its services in sorting and delivering the complainant's logs, during any of the years in dispute, more than fifty cents per thousand feet, and therefore this case does not present the question whether, where it appeared the actual cost of sorting and delivery exceeded fifty cents, the defendant, in a Michigan court, would be entitled under the Michigan law (Act No. 91, Pub. Acts 1887), which requires only that the charge be reasonable and uniform, without other limitation, to exact at least the actual cost of the work, notwithstanding the Wisconsin limitation of fifty cents.

"The complainant conceded a boomage charge of fifty cents a thousand upon all of its logs delivered in 1904-7 was earned, and was reasonable and lawful, and also that the defendant is entitled to charge in addition for rafting and for any extra sorting not done for the other owners.

"The controversy between the parties is, it will be seen, narrow, and presents practically the single question whether the amounts received by the defendant in those years beyond fifty cents was a reasonable charge for rafting.

"April 17, 1914, the defendant commenced a suit in the circuit court of Milwaukee county, Wisconsin, against the complainant, to recover boomage and rafting charges upon logs delivered during the driving seasons of 1908 to 1913, inclusive. The suit was commenced by attachment which was levied on certain lands owned by the complainant in Wisconsin. The complainant appeared in that suit and answered, setting up the alleged excessive charges upon the logs delivered in 1904-1907, by way of offset, or, as it is called in Wisconsin, counterclaim, against the demand of the defendant. In bar of the counterclaim the defendant pleaded, among other matters, the statute of limitation. The cause being at issue, it was, by stipulation of counsel, for the convenience of witnesses and parties, transferred from the circuit court of Milwaukee county to the circuit court of Marinette county, which is a court of original, general, common law and equity jurisdiction. After the case against the complainant reached the Marinette circuit court, where it

is now pending, and on October 23, 1914, the bill of complaint by which this suit was commenced was filed.

"The bill of complaint sets up the commencement and pending of the Wisconsin suit; the complainant's claim for excess charges in 1904-5-6-7, and that it is barred in Wisconsin and is not barred in Michigan by lapse of time from offsetting the amount of such alleged excess against the claim of the defendant. The bill prays for an injunction restraining the defendant from further prosecution of the Wisconsin suit and for an accounting of the amount due the defendant for delivery of logs in the year 1908 to 1913, inclusive, and of the amount of the alleged excess charges upon the logs delivered in 1904 to 1907, inclusive, and that the amount of such excess be offset against the defendant's claim.

"Upon the filing of the bill an order was made requiring the defendant to show cause why a temporary injunction should not issue restraining it as prayed. In opposing the issue of a temporary injunction the defendant insisted, the alleged excessive charges being assumed, the court was without jurisdiction to restrain the prosecution of a suit already commenced and pending in a court of another State. With leave to the defendant to save it by answer and present it again at the hearing, the point was overruled and the temporary injunction issued. Thereupon the defendant answered and the case was heard at due course on proofs taken partly before a commissioner and partly in open court.

"To entitle the complainant to any consideration, it must first show, of course, that the charges alleged by it to have been excessive were so in fact. Further than the testimony of the president of the company, Mr. J. W. Wells, and of Loe Bolanger and Mitchell Collette, no evidence was offered touching the cost of rafting, excepting certain figures taken from the books of the company, which will be noticed later.

"Mr. Wells testified that for three or four years previous to 1880 he rafted his own logs. 'For a year or so,' he said, all the logs sent down to the rafting gaps were owned by him, 'so that there was no sorting.'

"'Then Ramsey & Jones (also shore mill proprietors) came on the river. Their logs were sorted by the boom company to

the same pocket with ours, and we took the logs they ran into this pocket and rafted them up and handled them in that way.'

"The rafting was done by Mr. Wells at about the same place, with substantially the same facilities and under practically the same conditions as in 1904-7. It was necessary to separate from his own logs such of the Ramsey & Jones logs as were run into the common pocket, in order to raft his and theirs separately. Whether the amount of the Ramsey & Jones logs was large or small no attempt was made to show.

"In reply to the question, 'What was the total cost of rafting, including sorting?' Mr. Wells answered from 9½ to 11 cents. He was not asked to and did not give the cost of rafting alone, but it is evident he intended the lesser figure, 9½ cents, as the cost of rafting during the 'year or so' he rafted his own logs only, and when there was no sorting. Finding the rafting cost, when conducted by Mr. Wells in 1877-9, to be 9½ cents per thousand feet, does not, unfortunately, aid the court in arriving at the rafting cost in 1904-7. Mr. Wells said, and every one having the slightest familiarity with the floating of saw-logs knows it to be a fact, that the cost of rafting large logs, or a large number of logs, is less than the cost of rafting smaller logs or a smaller number of logs.

"From a record of the run of the river, which was introduced, it appeared that in the first year's operations, which was 1868, 62,809,804 feet came down. Thereafter the amount gradually increased from year to year until the maximum of 642,137,318 feet was reached in 1889. From that year forward there was a gradual decrease, until the low mark of 24,231,208 feet was reached in 1913. The record for 1914 or 1915 was not introduced, but that the decline has continued may be gathered from the common report that the drive going down as this is written will be the last, or the last but one, of the river.

"The run of the river when Mr. Wells was rafting was 137 million in 1877; the same in 1878, and 181 million in 1879, against 124 million in 1904, 91 million in 1905, 88 million in 1906, and 82 million in 1907. The fact that the run of the river was greater in 1877-9 than in 1904-7 does not necessarily mean that the number of logs in the Wells raft was greater in

the former than in the latter years. Whether Mr. Wells intended to be understood as saying the number of logs in the rafts of 1877-9 was the same or less than the number of the rafts of 1904-7, is not clear when his direct and cross-examination are compared, but he frankly admitted the run of the logs was materially larger in 1877-9 than in 1904-7.

"A record of the number and size of the logs that passed through the booming ground previous to 1878 was not kept, but was kept in 1878 and all subsequent years. According to the record kept from 1878 forward, the size of the logs dropped from an average of 161 feet in 1878, when Mr. Wells was rafting, to an average of 47 feet in 1907. The logs handled by Mr. Wells during the three years he was rafting averaged about six to the thousand, while the logs rafted in 1904-7 averaged about 20 to the thousand.

"Resulting from his 40 odd years' experience in river operations, Mr. Wells was able to say the handling of a large log is no more difficult than the handling of a small log and that the expense of handling increases as the size of the log diminishes.

"If it cost 9½ cents to raft six logs in 1887-9, what shall we say it cost to raft 20 logs in 1904-7, at the same place, with the same facilities and under the same conditions, except as to labor cost, which was higher? Figuring at the rate established by Mr. Wells, it would cost over 31 cents to raft 20 logs or 1,000 feet of timber.

"Joseph Bolanger, who was the defendant's foreman at the rafting gap since 1882, said seven or eight men could make up a raft of from 75,000 to 100,000 feet of logs in two hours. Mitchell Collette, who had no experience in making up rafts, but saw them made during his seven years' service on the river, gave it as his opinion that seven or eight men could make up a raft of about 75,000 feet in one hour. By spreading the labor cost of eight men for two hours against the number of feet of logs in the raft, complainant's counsel finds the average cost of rafting logs to be from 3 to 5 cents per thousand feet. There would be force in the testimony of these witnesses was it not that the other testimony in the case shows their conclusions to be ill-considered and unreliable. The complainant

will not expect the court to disbelieve the testimony of Mr. Wells, and that the court would have to do to give the opinions of Bolanger and Collette the construction and effect claimed for them by counsel. If their estimate is taken, it would put the rafting cost in 1904-7, when the logs were smaller and labor cost higher, much less than Mr. Wells said he found it, and many times less than the actual figures on the defendant's books show it to have been. Both these witnesses said that adverse winds made rafting more difficult and expensive and that the time for completing a raft, which they specified, contemplated ideal weather conditions.

"These rafts were not haphazard affairs. They had to be built on certain lines. They might be as long as the capacity of the tug admitted, but they must not be above a certain width to let them through between the piers of the drawbridge in their course out of the river. To that end it was not admissible to run the logs from the pocket into the raft booms hit or miss, but with deliberation and care, to see that each log was, as it is termed, 'ended up,' so as to keep the raft to the necessary width. When the raft was formed in that way ropes and chains were fastened across the booms to keep it in proper shape and intact while in transit.

"The record is silent on the subject, but it may perhaps be assumed as an incident of the business, that more or less time of the men was lost in waiting for the logs to come down, or through the failure of the owner to promptly remove a completed raft out of the way of constructing another. Counsel did not take those matters into his calculation, nor did he take into account the loss of a pike pole here and of a cant hook there, of a rope from one raft and a chain from another, or any other of the innumerable little but frequent happenings which, at the end of the season, foot up to a large figure to be added to the cost of rafting logs. In other words, counsel overlooked the fact that there are expenses incident to the rafting of logs besides the labor cost measured by the hours of men who were actually engaged in making up the rafts.

"It appears that since the defendant has been oper-

ating the booms it has kept a detailed account of the number, average size and scale of all logs that went through the booms, and of the actual cost of separating and delivering them into the various mills and rafting pockets, and also of the cost of rafting such of the logs as were delivered in that way. For the information of the directors, when the fixing of boomage rates was under consideration, these accounts were drawn off the books, classified, compiled and charted, so that the cost and net results of the operations for the year covered by the chart could be seen at a glance.

"The charts so made up for 1904, 1905 and 1907 were offered in evidence by the complainant, generally so far as the record discloses, and may be resorted to for such help as they offered in arriving at the cost of rafting in those years. Their accuracy or the accuracy of the books from which they were taken is not challenged.

"They show the actual rafting cost (not including rent of pockets or booms) for 1904 to have been .1686, for 1905, .1793, for 1907 (found by approximation for which the sheet furnishes a basis), .2029 per thousand feet. The chart for 1906 was not at hand, and unfortunately for exact figuring, both sides neglected to go to the books for the rafting cost of that year. There is no testimony on the subject to which attention has been called, except that of the witness Burke, at present secretary of the defendant, but who was its bookkeeper in 1906 and subsequent years. In reply to an inquiry by complainant's counsel, he placed the rafting charge for that year at 25 cents. The answer may, but does not appear to have been based on an examination of the books for that year. By comparison of figures found in the exhibits, defendant's counsel finds the 1906 cost to be .2409, but the exhibits do not, nor does the record of the case as a whole, furnish a certain basis for the result found by him. While the run of the river does not serve to fix with certainty, or even approximately, the amount of logs rafted in a given year, it may not, perhaps, be extravagant to presume, the run of the river being over three million feet less in 1906 than in 1905, that the logs rafted in 1906 did not exceed the amount rafted in 1905. This presumption is materially aided

by the fact that in 1906 there were rafted for the complainant alone 7,376,999 feet, against 4,928,598 feet in 1905. It appears the cost gradually increased from year to year. The charts show an increase in 1905 above 1904 of .0107, and an increase in 1907 above the cost in 1905 of .0236, and perhaps, also, it is not unreasonable to indulge the further presumption that the actual cost in 1906 at least equaled the cost in 1905. On the basis of these figures the defendant collected from the complainant in 1904 and 1905 less, and in 1906 and 1907 more, than the actual cost of rafting, not including rent of facilities. The amount paid above the cost in 1906 would be $742.86, and in 1907, $147.94, or a total for the two years of $917.70.

"The charts show a pocket rent charge which, when multiplied by the quantity of logs rafted for the complainant in 1904, 1905 and 1907, amounted to $749.51. This rent was applied only against logs rafted, and evidently was for the use of the rafting pockets, since the rafted logs were not pocketed except below the rafting gap.

"It was the privilege of the defendant to deliver the logs afloat and it was the duty of the log owner to provide a pocket or other contrivance for their reception at the point of delivery. The shore mill proprietors did not provide such pockets. For their use the defendant constructed various pockets and kept them in good repair and safe condition. It did not charge the log owner rent for such pockets in addition to the fixed rate for sorting and delivery in rafts, but the use and wear and tear thereof was taken into account as an item of expense in making the rate, and, under the designation 'pocket rent,' it will be found listed against all logs rafted, in addition to all other items of expense.

"When the logs were run through the rafting gap and into the pocket set apart to their owner, the services of the defendant, covered by the terms, 'holding, sorting and delivering' terminated. Any 'holding' of the logs above the rafting gap—the point of delivery by means of booms or otherwise, would be compensated for by the legal rate for 'holding, sorting and delivery.' But that rate would not compensate for,

and was not intended to cover, the rental value of a pocket set apart by the defendant, for the exclusive use and convenience of a log owner, in the holding of his logs, until at his leisure, he saw fit to provide a tug to take them away. The holding which the law contemplates as covered by the fifty cent rate, is only such holding as is ordinarily incident to the sorting and delivery of logs. It is always necessary to hold the logs to make a delivery, and it is commonly necessary to hold them on account of water conditions, and possibly for other reasons. For any other holding or sorting the defendant is entitled to be compensated. Otherwise an owner might allow his logs to remain in the booms an entire season. No such unjust result was intended by the legislature of either State.

"If it was concluded that storing in the rafting pocket was an incident of booming and not of rafting nevertheless the complainant should not escape accounting for the rent. It saw fit to sweep aside the written contract covering all these matters, and invoke the law which declares for a reasonable and uniform rate. Having invoked the principle of uniformity it must expect to have it applied against it as well as in its favor.

"Uniformity is not accomplished by making the same rate for the same service, to all log owners. It requires also that no valuable service be rendered to one log owner without charge, that is not rendered to all log owners without charge. To compel one log owner to construct and maintain a reception pocket, at his own expense, and give the same facilities free to another owner, would be discrimination. Such free use of the pocket would amount to a rebate of a portion of the boomage charges, and what amounted, directly or indirectly, to a rebate of any portion of such charges, the defendant has no right to give or the complainant to receive. That the collection of the pocket rent, if classed as an incident of booming might increase the boomage rate beyond the legal limit, would be no objection. The complainant had a right to allow matters to remain as they were or invoke the rule of uniformity. Having invoked the law he will not be allowed to claim its benefits and disregard its obligations. Whether the rent is properly considered

a boomage charge or not, the defendant as against the complainant, is entitled to credit for it. If it is found to increase the boomage rate beyond the legal limit, it will become a matter of adjustment between the defendant and all the log owners. Any boomage charges collected by the defendant above the legal rate belongs to the log owners and should be pro-rated among them.

"Crediting the defendant with the pocket rent will serve to reduce the apparent excess rafting cost paid by the complainant, to $168.19. But the defendant is also entitled to credit for the use of its towing booms employed in conveying the logs from the river to the mills. That use was stipulated for in the written contract ten cents per hour per set, to be charged for from the time they were put in use until returned to the rafting gap empty. The 1904-7 accounts paid by the complainant do not include a charge for the towing booms. The record does not show, exactly or approximately, the number of hours the towing booms were employed but, when it is considered that over 21,000,000 feet of logs were transported in the booms; the leisurely way on which log rafts necessarily proceed, the delays resulting from adverse winds and other difficulties naturally associated with the business of towing and it will be appreciated that the booms must have been in service a considerable time, and that the use of them at the ten cent rate, or even half that amount would aggregate a substantial sum.

"At the request of the complainant its cedar logs were separated from its other logs. This was extra sorting. The complainant [defendant] may have done similar sorting for other owners, but did not do it for all the other owners. The amount of cedar sorted cannot be definitely stated from the testimony. It may not have been a large amount. But, whether the services occupied much or little of the time of the defendant's employees, it was, to the extent it was given, a valuable service put on the logs of the complainant and not on the logs of all other owners. The defendant not only is entitled, but the observance of uniformity requires that it exact credit for such extra sorting.

"The defendant's credit must also include a reason-

able profit on its business. Whether we may take into account the risk of injury to employees, the work is extra hazardous—and of the breaking up of rafts and the loss of logs through the carelessness of employees, of imperfection of appliances, against which even the prudent cannot always guard, as well as a fair rate of interest on the money invested, or are confined to a fair rate of interest on the money employed on the work (outside the investment on pockets and booms which are taken care of by rents) the allowance would represent a considerable sum.

"And what shall be said of the under charge in 1904 and 1905? The total amount paid for booming and rafting in 1904 was 56 cents and in 1905 was 66 cents. It is admitted the boomage cost in both years was fifty cents. The charts show the cost of rafting, outside the rent of facilities, to have been .1686 in 1904 and .1793 in 1905. The result was that, in the two years, the complainant paid for the service on its logs $557.39 less than what it actually cost the defendant.

"It must be clear that the complainant cannot, in a court of equity, have these accounts, which were supposed to be concluded by contract, re-written upon the basis of a reasonable charge for the service, without being compelled to pay, at the time it receives, what is reasonable. The complainant may not demand equity and at the same time refuse to do equity. In any equitable adjustment of these accounts, every under charge, as well as every over charge, must be considered.

"The object of this review is not to show an indebtedness from the complainant to the defendant, but the failure of the complainant to show by a preponderance of the evidence as it is required—an indebtedness from the defendant to it.

"The question in this case which especially challenges interest, is whether, under any circumstances, and if so, whether under the circumstances disclosed by the proofs, this court would be justified, by the indirection of its injunction, to the defendant in restraining the trial of, and rendition of judgment in, the suit pending in the Marinette circuit court.

"It was held in *Carroll* v. *Mechanics' Bank*, Har. Ch. (Mich.) 197, that injunction will not issue from

the courts of this State to enjoin the plaintiff from prosecuting a suit commenced and pending, in a court of a sister State. On dissolving such an injunction it was there said:

"'It has been repeatedly decided that courts of chancery will not sustain an injunction bill to restrain a suit or proceeding previously commenced in a court of a sister State. * * * The affidavit discloses the fact that the injunction allowed in this cause purports to restrain the proceedings of a cause not only at issue, but pending in the court of another State. * * * This being apparent there can be no room for doubt as to the duty of the court, so far as to modify the injunction to divest it of this anomaly. * * * The prompt correction of this error is called for by a decent regard for the reputation of the court and the judicial proceedings of the State.'

"The doctrine of that case, which was decided about 1840, has never been questioned before the Supreme Court of this State and is supported by the decisions of other courts. *Mead* v. *Merritt,* 2 Paige (N. Y.), 402; *Harris* v. *Pullman,* 84 Ill. 20; *Lockwood* v. *Nye,* 58 Am. Dec. 76 (2 Swan [32 Tenn.], 515); 11 Cyc. p. 1018, note 49.

"A line of decisions will be found which hold that when the parties reside in the same State, equity will interfere to restrain one of them from prosecuting a suit commenced by him in the courts of another State, when it clearly appears the prosecution of such suit to judgment or decree would result in oppression or fraud. But running all through those cases, will be found the determination of the courts, not to break over the rule of comity and policy which forbids the granting of injunction to stay proceedings in a suit, which has already been begun in a court of competent jurisdiction of a sister State, except where the circumstances are very special, where there exists, not ordinary, but some peculiarly equitable grounds for so doing. *Burgess* v. *Smith,* 2 Barb. Ch. (N. Y.) 276; *Bank of Bellows Falls* v. *Railroad Co.,* 28 Vt. 470.

"Situations will arise where litigations between residents of the same State, conducted to a conclusion in the courts of another State, will operate so oppressively as to shock the conscience of equity. To prevent such results courts of equity should have power.

But the only satisfactory doctrine, because the only doctrine compatible with the dignity of the courts of the country and the orderly administration of justice everywhere, would be to hold the court in which the objectionable suit was commenced, and that court only, entitled, at the instance of the aggrieved party, to refuse to proceed further with the suit, where it appears the object of the plaintiff was to evade the law of the State of his residence, and upon view of the facts and the laws of the State of the residence of the parties, applicable thereto, the court is convinced the prosecution of the suit pending before it, to judgment or decree, would result in giving the plaintiff an unconscionable advantage. The only situation which would seem to justify a court of one State, in stopping by its writ of injunction, the prosecution of a case pending in a court of a sister State, would be where the equitable considerations are plain and compelling, and the aggrieved party, through poverty, is utterly unable to present his equities to the foreign court.

"If the rule of the *Carroll Case* is not, and the more liberal rule contended for by the complainant is, applied to the facts of this case, the complainant is in no better position.

"In an effort to bring itself within the rule of the line of cases referred to, the complainant claims the dealings were, and the Wisconsin suit, to all intents and purposes, is, between Michigan corporations; and that the service involved in the controversy were put on the logs in Michigan, under an applied contract which arose in Michigan. In none of these claims is it supported by the proofs, and, if they were all true, it has failed to prove a case showing any equities in its favor, much less a case justifying the exercise of the extraordinary jurisdiction involved in this application.

"Respecting the domicile of the defendant the situation is unusual. The effect of the consolidation of the Michigan and Wisconsin corporations was not to create a single corporation in both States but to create a separate corporation in each State, owing its existence to the law of that State and that State only. In Michigan the defendant is regarded as a corporation of, and as having its existence and domicile in Michigan where in Wisconsin it is regarded as a corpora-

tion of and as having its existence and residence in that State. *Chicago, etc., R. Co.* v. *Auditor General,* 53 Mich. 79; 2 Clark and Marshall Private Corp., § 362 and notes. The decisions, both State and Federal, are numerous, and, as far as observed, unanimous, to the conclusions that, for all purposes of jurisdiction the consolidated corporation is to be considered a corporation and citizen of the State where it is found, or where it sues. 1 Clark & Marshall Private Corp., § 117, note 14. While, therefore, the corporation before this court is a corporation of, and is domiciled in, this State, that fact furnishes no ground for the position that the complainant is being proceeded against by a Michigan corporation, in the courts of Wisconsin.

"In legal effect the consolidation of these companies amounted to no more than permission to have the same membership, to be controlled and managed by the same officers, and to pool their earnings coupled with the duty to respond to the extent of their property and resources, in discharge of all obligations contracted by either. Each corporation is entitled to exercise in the State of its creation the powers there granted to it, but it is not entitled to exercise these powers or any power in the State which created the corporation with which it has consolidated. The authorized activities of these corporations stop with the boundary line between the two States. The corporation before this court did not commence, cannot discontinue, or act, in relation to the Wisconsin suit, in any way. The effort of the complainant, if successful, would not be to restrain the corporation before the court, from prosecuting the Wisconsin suit, but to compel the Wisconsin corporation to forego the prosecution of a suit lawfully commenced by it in the State of its creation.

"Wherever it is sought to enjoin a suit commenced in the State of its creation, by a corporation which has lawfully consolidated with the corporation of another State, and the domicile of the corporation bringing the suit is important, its domicile must be held to be in the State of its creation, regardless of the court or State where the question is raised.

"Both parties accede to the ruling in the *Spies Case*

that, for want of lawful authority for the rates therein specified, the written acceptance by the complainant of the rates and terms set forth in its letter of the defendant, did not constitute a contract for the driving, sorting, rafting and delivery of the logs. There was an implied contract to that effect which arose by the delivery to, and acceptance of the logs, by the defendant. The place where the contract was made was the place where the logs were delivered and accepted. They were delivered afloat and partly in Michigan and partly in Wisconsin and, in being passed through the boomage ground, as well as in transit down the river, they were first on one side of the river and then on the other. This we know of common knowledge. If, therefore, the place where the contract was made or performed, has a bearing it appears that the contract, as to some of the logs was made in Wisconsin and the service upon all of them was performed, partly in Wisconsin.

"By pleading the alleged excess as an off-set or counter-claim, in the Wisconsin suit, the complainant in effect, commenced, in that court, a suit to recover such excess, which has not been discontinued. That course should be reason, sufficient in itself, to deny the injunction sought in this case.

"The Wisconsin court has not passed on the question, but it is conceded by counsel, and for the purposes of this decision it will be assumed, that the claim for the excess, having accrued six years before the commencement of the Wisconsin suit, is barred by the statute of limitations of that State. The claim did not, however, accrue six years before the defendant's right of action accrued, and, consequently, had the defendant sued on its demand in Michigan, lapse of time would not have been a bar to the presentation of the complainant's claim by way of off-set. 3 Comp. Laws, § 9746 (3 Comp. Laws 1915, § 12337); *Busch* v. *Wilcox*, 106 Mich. 514.

"The purpose of this suit is to give the complainant the same advantage it would have if the Wisconsin suit is discontinued and a suit is brought by the defendant, on its demand, in Michigan. To that end, and on the naked proposition that the complainant has

a claim which it could have, but failed to sue, in Michigan or Wisconsin, any time during six years, and which it cannot now enforce unless the defendant is coerced into bringing an action on its demand in Michigan, this court is asked to interfere with the orderly progress of a suit pending in a court of another State, without showing the defendant, in any way, responsible for the situation; or that the situation has not arisen through the neglect of the complainant.

"It is well settled that where an adequate remedy at law has been available and has been lost by negligence, or merely failure to seek it at the proper time, equity will not interfere to grant relief. 16 Cyc. pp. 38-40.

"Equity is not solicitous for those who sleep on their rights. An appeal to equity cannot be made on the ground that the complainant has lost its right to sue in Michigan or Wisconsin, unless, at least, it was prevented from suing by accident or fraud. And where relief is permissible on the ground of accident or fraud, to obtain relief the complainant must affirmatively show that the loss of legal remedy was occasioned by such matters of equitable excuse, unmixed with negligence on its part. 16 Cyc., pp. 39-40.

"In the spring of 1908 the complainant protested against the rate for that year, which was the same as the rate for 1906, and within 4 cents of the rate for 1907. It retained an attorney to appear, and who did appear at a meeting of the directors of the defendant and gave emphasis to such protest. The objections which were presented at that time were equally applicable to the 1904-7 rates, although no request was then made to disturb 1904-7 settlements. Whatever may have been the fact earlier, that its attorney and officers did not then know all the material facts, including the Wisconsin statutes on the subject of rates, is not seriously claimed. They knew of, and practically joined in, the protest of the Spies Lumber Company, and of the suit of that company and the claims upon which it was based. Plainly, ignorance of fact or law, played no part in the failure of the complainant to earlier enforce its alleged claim. Except to mail a letter to the defendant February 24, 1912, over six years after the last of the 1904-7 payments

had been made, requesting credit for alleged excessive charges in those years, no effort of any sort to collect, and no attempt of any sort to enforce the demand, was made until after the commencement of the Wisconsin suit. The record is barren of any evidence upon which to found a claim that the complainant was induced to non-action by any promise, representation, or conduct of the defendant or its officers. The secretary of the company gave as a reason for the defendant not suing earlier, a supposed understanding that the boomage and rafting charges entered against the complainant in 1908 and subsequent years, would be settled upon whatever basis was held proper in the Spies suit. But he did not, nor did the complainant's officers say there was any such talk or understanding regarding the 1904-7 accounts, concerning which no question was raised at any time until the mailing of the complainant's letter of February 24, 1912.

"With the exception of a director or two, the officers of the defendant resided at Marinette. Let it be assumed without deciding the question, that service could not have been made on a director. Service of process does not require the residence, but the presence, of the proper officer in Michigan. An attempt to make that showing would have failed. Menominee and Marinette, separated by a narrow stream, are connected by two bridges. In a business way and socially they are practically one town. The business of the defendant was largely with Michigan mills. Its operations necessitate the frequent presence of its officers, agents and superintendent, on both banks of the river. Bent on business or social affairs, their officers and agents were a familiar sight on the streets of Menominee. If the complainant encountered difficulty in serving the process in this case there were special reasons for it.

"Furthermore, the claim which totals about $3,800, could have been enforced by attachment. The record is undisputed that in and ever since 1904, the defendant has owned real estate in the city of Menominee, subject to levy and sale on execution, and valued on the assessment roll of the city of $30,000.00.

"The foregoing, or any, discussion of the complainant's ability to get service or enforce its claim is idle.

The complainant is estopped from denying it could have obtained service. That the statute of limitations has run against a suit at law, by the complainant in Michigan, is the theory of the bill. It is the sole foundation of the bill. It is the only excuse which the complainant could possibly offer, and the only excuse which it does offer, for the commencement of this suit.

"It is objected that the complainant would not, in any event, be entitled to offset its claim because it is not liquidated. Its claim, if it has any, is unliquidated. This point was good when this suit was commenced, but, should the defendant be now enforced to sue in Michigan, the unliquidated condition of the claim would not prevent the off-setting thereof. Cummins & Beecher Judicature Act, § 591 (3 Comp. Laws 1915, § 12468).

"The defendant takes the further position that the payment of the 1904-7 accounts were voluntary and are not recoverable, in whole or in part, for that reason. The complainant contends they were not voluntary because of its ignorance of the material fact that a maximum boomage rate was fixed by the Wisconsin statute.

"In dealing with this question it is necessary to keep in mind that the services rendered by the defendant were of two kinds, viz.: the sorting and delivery, otherwise called the 'booming,' of the logs and the rafting of the logs. The boomage rate is limited to what is reasonable by a Michigan statute and to 50 cents per thousand feet by the Wisconsin statute. There is no statute in this State or in Wisconsin, limiting the rate to be charged for rafting. The defendant is not required by its charter to raft the logs. That was a service which it was at liberty to render or refuse to render. That service which is voluntarily assumed it was authorized to discontinue whenever it sees fit, or perhaps on a reasonable notice to its patrons to avoid losses. The parties had a right to contract for that service and a contract rate would stand, whether it represented more or less, than a reasonable return to the defendant for its investments, expenses and risks. The defendant is held here to a reasonable rate for rafting not because any statute says a reasonable rate must be applied, but because,

finding no contract covering a rafting charge specifically, compensation can be measured only by what the service is found to have been reasonably worth. The complainant is not seeking to recover back overpaid boomage charges, but overpaid rafting charges. If the rafting charges had been separate from the boomage charge when paid, so that the complainant knew the amount of rafting charge, there would be no difficulty, under the facts of this case in holding the complainant to a voluntary payment. And this would be so, even if, growing out of the situation of the parties, the common-law duty rested on the defendant to raft the logs and for a reasonable compensation.

"The argument is that, being ignorant of the Wisconsin limit respecting boomage charges, the officers of the complainant did not know the charge beyond fifty cents was for rafting and they were, therefore, unable, at the time of payment, to judge whether the rafting charge was reasonable or otherwise.

"The officers of the complainant were familiar with the operations conducted by the defendant in the boomage ground, and the nature and the extent of the work put on the logs of the complainant and on those of all other owners. The complainant knew the Michigan law, at least, required that the boomage rate be both reasonable and uniform; and that the rates, from year to year, were not uniform. It contracted for the defendant's services on that plan, and paid the rates without objecting for a long period of years. Such a length of acquiescence justified the defendant in assuming the plan was satisfactory and no doubt had its effect in leading the defendant to deal with others along the same lines. That when it paid the 1904-7 accounts, it knew all it was necessary to know to safeguard its rights, except Wisconsin rate statute, is not denied. It does not claim it supposed the boomage rate which entered into the total charge for either of those years exceeded fifty cents. Without it entertained that belief, it is difficult to fathom how its want of knowledge of the Wisconsin statute affected the situation.

"The Wisconsin statute was not hidden by the defendant. Ordinary business prudence would have

prompted the officers of the complainant to have them examined for what they provided regarding rates. If they were not at hand in Menominee, they lay at the other end of the bridge which the complainant's officers frequently crossed.

"Whether a party should be held relieved from the effect of payment, by setting up ignorance of a material fact, which was discoverable on slight effort, and which the ordinarily prudent, in his situation, would be expected to investigate, is a point which the authorities presented do not quite cover. How the point would be ruled in an action at law, or in a court of equity where the common jurisdiction of equity was only involved, it is unnecessary to speculate. Culpable ignorance of a material fact should not avail as a basis for the exercise of the jurisdiction of equity herein invoked. That the complainant paid an account in ignorance of a fact which was open to the light of day during the fifteen years or more, in each of which it paid similar accounts, and which, if common prudence had been exercised, it would have known, would be a poor excuse to give a foreign court for the reflection on its integrity, or on the justice of the laws of its State, with which an injunction staying its proceedings, unavoidably, would be tainted.

"A decree will be entered dismissing the bill of complaint with costs in favor of the defendant, to be taxed."

Counsel have filed very elaborate briefs. In appellant's brief we find the following criticism:

"Referring to the opinion of the learned circuit judge, in whose opinions we usually find great force and logic, we must say in this case we are baffled at both his arguments and conclusions, and can find no other explanation therefor than that, from some cause, he overlooked much in both pleadings and evidence. We therefore refer to his opinion in confidence that this court will conclude that in many features thereof it is erroneous.

"The opinion seems, at almost the outset, to show the court did not have in mind the location or identification of the rafting gaps. This error alone is suffi-

cient to rend asunder his whole treatment of the subject of 'rafting.' "

Following this criticism, counsel quote the testimony of two witnesses, one of whom places these gaps between figures 9 and 10 of the blue print, and the other between figures 10 and 11. The last of these witnesses explained in detail the work of separating the logs and an examination of the record we think justifies the description of the judge of the operation pursued. Other criticisms of the statements of the judge as to what the evidence shows have been examined, and we do not find them justified by the record, but even though the trial judge was mistaken as to some of the unimportant details it is evident he was not mistaken as to the essential and controlling facts.

A careful examination of the somewhat voluminous record and the reading of the able briefs of counsel satisfy us that the case presented by the plaintiff would not warrant the interference of a Michigan court of equity, with the law case in Wisconsin and the granting of the relief prayed, for the reasons stated by the trial court in his opinion.

The decree is affirmed, with costs to the defendant.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEOPLE *v.* POWERS.

1. CRIMINAL LAW—BURGLARY—LEADING QUESTIONS—CROSS-EXAMINATION—EVIDENCE—WITNESSES.

   In a prosecution for burglary, where defendant was a witness in his own behalf, *held*, no such abuse of discretion as to constitute reversible error for the trial court to permit leading questions to be put to him, on cross-examination.

2. SAME—WITNESSES FOR PROSECUTION—INDORSING NAMES ON INFORMATION—APPEAL AND ERROR.

   In such prosecution, the court below was not in error in permitting the indorsement of the names of two witnesses upon the information after the trial began, where the prosecutor stated he had just learned of the witnesses, and no claim for a continuance was made.

3. SAME—INDICTMENT AND INFORMATION—SUFFICIENCY — STATUTE —BURGLARY.

   Although a "garage" is not one of the buildings mentioned in the statute (3 Comp. Laws 1915, § 15292) under which the prosecution was brought, an information describing the place of the offense as "the shop, to wit, the garage," etc., was sufficient.

4. SAME—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

   It was not error for the court below to refuse a requested instruction as to reasonable doubt, where there can be no doubt that, from the charge as a whole, the jury understood the burden which was put upon the people and what constituted a reasonable doubt.

5. SAME—ARGUMENT OF COUNSEL.

   Argument of the prosecutor in reply to defendant's attorney and justified by the testimony of defendant was not prejudicial error.

6. SAME—TRIAL—MISCONDUCT OF JURY—AFFIDAVITS.

   Where, if the affidavit of the officer in charge of the jury is believed there was no misconduct on the part of the jury or the officer in charge, alleged error based thereon was not prejudicial; the trial judge having the advantage of knowing the affiant.

Exceptions before judgment from Barry; Smith, J. Submitted June 14, 1918. (Docket No. 104.) Decided September 27, 1918.

Leslie Powers was convicted of burglary. Affirmed.

James M. Powers and *Frank A. Dean,* for appellant.

Thomas Sullivan, Prosecuting Attorney, for the people.

MOORE, J. An information was filed against respondent, which, omitting the formal parts, reads—

"that one Leslie Powers, late of the city of Battle Creek, in the county of Calhoun and State of Michigan, heretofore, to wit, on the 9th day of September, 1916, at the township of Assyria in said Barry county, about the hour of twelve o'clock in the nighttime of said day, with force and arms, the shop, to wit, the garage of one Frank Schroder, there situate not adjoining to or occupied with a dwelling house, feloniously and burglariously did break and enter with intent the goods and chattels of the said Frank Schroder in the said shop, to wit, garage; then and there being found, then and there feloniously and burglariously to steal, take and carry away, * * * gives the court further to understand that the said Leslie Powers on the 9th day of September, 1916, at the township of Assyria in said Barry county, did break and enter the garage of one Frank Schroder and one automobile of value of $350.00, of the goods and chattels of said Frank Schroder, then and there being found, feloniously did steal, take and carry away; contrary to the form of the statute in such case made and provided."

The case was tried before a jury which returned a general verdict of guilty.

Sixteen of the assignments of error relate to the admissibility of the evidence. They have all been examined with care. Some of the questions to which answers were permitted were leading. Some of them

were put to the respondent, who was a witness on his own behalf, on the cross-examination. There was no such abuse of discretion on the part of the trial judge as to any of these questions and answers as to constitute reversible error.

Under one of the subdivisions of this head it is urged as error that the trial judge permitted the indorsement of the names of two witnesses upon the information after the trial began. The prosecutor stated he had just learned of the witnesses. There was no claim that if the indorsement was made and the witnesses were sworn that a continuance was desired. The trial judge did not err in this regard, see *People* v. *Durfee*, 62 Mich. 487; *People* v. *Perriman*, 72 Mich. 187; *People* v. *Mills*, 94 Mich. 630; *People* v. *Machen*, 101 Mich. 400; *People* v. *Moore*, 155 Mich. 107; *People* v. *Bollman*, 178 Mich. 159.

Fourteen assignments of error relate to the refusal of the court to give respondent's written requests to charge, and seven assignments relate to the charge as given. We shall not discuss each of these assignments of error, but will refer to those which seem to have most merit.

The second request on the part of the respondent reads:

"The warrant and information in this case by which the charge against the respondent is made, contain two counts: The first count charges the breaking and entering the 'garage' of Frank Schroder, not adjoining to or occupied with a dwelling house, in the nighttime, with intent to commit the crime of larceny. I instruct you that a 'garage' is not one of the buildings mentioned in the statute under which this prosecution is brought, and consequently the respondent cannot be convicted of the charge of breaking and entering as set forth in the first count of the information and that charge must be dismissed entirely from your consideration."

The court charged the jury upon that subject as follows:

"I instruct you, gentlemen of the jury, if you find from the evidence that these three were acting together for the purpose of breaking and entering this building and taking this car therefrom, then if you should further find from the evidence only one of the parties broke and entered the building and took the car therefrom, while the other two remained by the roadside for the purpose of aiding and assisting the one who entered the building, either in making his escape or in conveying away stolen property taken therefrom, then all of said parties would be guilty of burglary and larceny.

"I instruct you further, gentlemen of the jury, that if you should find from the evidence in this case, that any one of the defendants broke and entered this building in the nighttime with the knowledge, consent and co-operation of the other two, with the intent to commit larceny therein, then the crime of burglary would have been committed and all are equally guilty, provided this building is not adjoining to or occupied with a dwelling house.

"I instruct you further, gentlemen of the jury, that if you find from the evidence that Leslie Powers, the respondent, broke and entered this building in the nighttime with intent to commit the crime of larceny, then he should be convicted under the first count of the information.

"Should you find further, from the evidence in the case, that after breaking and entering this building with the intent hereinbefore mentioned, he committed the larceny intended and took the car, then he should be convicted under the first and second counts of the information."

It will be observed that the request to charge ignored the fact that the place of the offense was described as "the shop, to wit, the garage, of one Frank Schroder." See *People* v. *Wycoff*, 150 Mich. 449; 3 Comp. Laws 1915, § 15292.

The following request was preferred:

"By the term reasonable doubt, as I have used it in these instructions, is meant a fair doubt, growing out of the testimony in the case or the lack of testimony. It is not a mere imaginary, captious or possible doubt, but a fair doubt, based upon reason and common sense; it is such a doubt as may leave your mind, after a careful examination and consideration of all of the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty of the truth of the charge here made against this respondent."

The court said to the jury in part as follows:

"Another rule is that the burden of proof rests with the people and the people must prove by legal testimony and beyond a reasonable doubt a state of facts which will justify a conviction. Guilt is not to be lightly assumed from the proof, but it is to be clearly established, or as the law says, beyond a reasonable doubt. In other words, the proof in the case must be such as to clearly show the guilt of the respondent and not be reasonably consistent with any other theory than that of guilt. In criminal cases, full and satisfactory proof of guilt is required. No mere weight of evidence will warrant a conviction unless it be so strong and satisfactory as to remove from your minds all reasonable doubt of the guilt of the accused. In considering this case, you are not to go beyond the evidence to hunt for doubts, nor should you entertain such doubts as are merely fanciful or based upon groundless conjecture. A doubt to justify an acquittal must be reasonable and must arise from a candid and impartial consideration of the evidence in the case, and it must be such a doubt as would cause a reasonably prudent and considerate man to hesitate and pause before acting in the grave and more important affairs of life. If, after a fair and impartial consideration of the evidence in the case, you can say and feel that you have a firm and abiding conviction of the guilt of the respondent and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt and in such case your verdict would be guilty. (In other words a reasonable doubt must be a doubt which arises from the evidence

in the case), not a doubt which is mere conjecture, not a doubt having its origin in something else than the evidence, not from a desire to acquit or from sympathy, prejudice or favor, but in the language of a law writer, 'A reasonable doubt is a fair doubt growing out of the testimony in the case.' It is not a mere imaginary, captious or possible doubt, but a fair doubt based upon reason and common sense; it is such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say that you have an abiding conviction of the truth of the charge made against the respondent."

The criticism is that the judge omitted the words "to a moral certainty" and used the sentence "In other words a reasonable doubt must be a doubt which arises from the evidence in the case." When the charge is read as an entirety there can be no doubt the jury understood the burden which was put upon the people and what constituted a reasonable doubt. *Hall* v. *People,* 39 Mich. 717; *McGuire* v. *People,* 44 Mich. 286; *People* v. *Davis,* 171 Mich. 241; *People* v. *Lalonde,* 171 Mich. 286; *People* v. *Kreidler,* 180 Mich. 654; *People* v. *Coulon,* 151 Mich. 200.

The argument of the prosecutor is criticised. Part of it as appears by the record was in reply to the argument of one of the attorneys for defendant, and the other part was justified by the testimony of the respondent who was sworn as a witness.

Many pages of the brief of respondent are devoted to an argument that the court erred because of the misconduct of the jury and of the officer in charge of the jury. This argument overlooks the affidavit of the officer as to what was done and said. If his affidavit is believed there was no misconduct that calls for a reversal of the case. The trial judge had the advantage of knowing the affiant.

The remaining assignments of error have had our careful consideration though we do not feel called upon

to discuss them. The respondent had the advantage of able and vigilant counsel. His case was carefully tried. We find no reversible error.

The conviction is affirmed, and the case is remanded for further proceedings.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

COUNTY OF SAGINAW *v.* McKILLOP.

1. WATERS AND WATERCOURSES — DRAINS — RIGHTS OF RIPARIAN OWNERS—QUESTION OF LAW.

   The right of large numbers of people, some of whom are riparian owners and some of whom are not, to drain into the upper reaches of a river not in its natural state, but by proposing to change the river bed itself in a very marked degree to the alleged great harm of lower riparian owners and others, by greatly increasing the flow of water, particularly in time of high water, should not be disposed of as a question of law.[1]

2. SAME—DAMAGES—HEARING UPON MERITS.

   The elements that enter into the question of damages are so many that the case ought not to be disposed of upon the averments of plaintiffs' bill to restrain the construction of said drain and the motion to dismiss.

Appeal from Saginaw; Mayne, J., presiding. Submitted June 19, 1918. (Docket No. 75.) Decided September 27, 1918.

Bill by the county of Saginaw and others against Alexander H. McKillop, drain commissioner of La-

[1] See note in 24 L. R. A. (N. S.) 903.

peer county, and others, to enjoin the construction of a drain. From an order denying a motion to dismiss, defendants appeal. Affirmed.

John F. O'Keefe, Prosecuting Attorney, and *Robert T. Holland,* City Attorney (*Miles J. Purcell,* of counsel), for plaintiffs.

Theo. D. Halpin, Walter S. Wixson, and *Charles F. Gates,* for defendants.

MOORE, J. This is an appeal from an order of the circuit court, in chancery, denying a motion of defendants to dismiss the bill of complaint in this cause, which prays for a permanent injunction restraining the defendant drain commissioners and the defendant contractors from constructing the Flint river drain, a project regularly established and which contemplates the improvement of the north branch of the Flint river lying within that portion of Lapeer county extending from the upper reaches of the stream to a point at or near Columbiaville in said county.

The bill of complaint has the following averments:

"That each of the said plaintiff townships, as well as the plaintiff city of Saginaw, are located upon or adjacent to the Saginaw river and the Flint river in Saginaw county, and the said Flint river and Saginaw river traverse the said plaintiff county of Saginaw. That the said plaintiff the Henry Passolt Company is the owner of property adjacent to the said Saginaw river, as above described, and the said plaintiff Horace E. Sloan is the owner of property lying adjacent to the said Flint river, as above described.

"8. The plaintiffs further allege that the Saginaw river is formed in Saginaw county a short distance above the city of Saginaw, by the confluence of the Cass river, Flint river, Shiawassee river and the Tittabawassee river, and that said Saginaw river thereafter traverses Saginaw and Bay counties to Saginaw Bay, a distance of about 17 miles, and that said Saginaw river, together with the rivers above named

and their respective tributaries, drain the watershed in the eastern part of the lower peninsula of Michigan, containing upwards of 6,000 square miles. That the Flint river, one of the streams forming the said Saginaw river, traverses the counties of Saginaw, Genesee, Lapeer, Tuscola, and Sanilac. That the said Saginaw river, which is the outlet of the system above referred to, runs through a flat territory so that the bottom of the river throughout the whole length of 17 miles or thereabouts is practically level. Said river, however, during normal periods of the year affords an adequate outlet for the waters naturally and normally flowing therein from the streams and tributaries whose confluence form said river. * * *

"11. These plaintiffs allege that on February 5, 1914, a petition bearing date July 9, 1913, was filed in the office of the drain commissioner of Lapeer county, petitioning and applying for the construction of a drain to be known as 'Flint river drain' and providing for the deepening, widening and improvement of the north branch of the Flint river, a distance of, to wit, 24 miles. That the first order of determination upon said application was entered October 19, 1914, and filed on the same date; that the final order of determination was entered on February 4, 1916, and filed on the same date; that said final order of determination was signed by Mr. Alexander H. McKillop, county drain commissioner of Lapeer county, who is made defendant herein; by Albert Hunter, drain commissioner of Tuscola county, who is made defendant herein; and by Stewart D. Nicol, county drain commissioner of Sanilac county, who is also made a defendant herein. That on said February 4, 1916, by action of the said county drain commissioners in joint session, the expenses of the construction of said 'Flint river drain' were apportioned between the three counties alleged to be interested therein as follows: * * *

"That the width of ground proposed to be condemned for the excavation of said drain and the deposition of earth is 200 feet along the course of said drain, being 100 feet on each side of the center line thereof. That the total length of said drain as proposed is 7,568 rods, or 23 miles and 208 rods. That

beginning at station O, or the outlet, so-called, of said drain, the width of bottom excavation is 40 feet, and the width of surface excavation is 60 feet. That said dimensions are the same until station 322 is reached. Beginning with station 323, the width of bottom excavation is 40 feet, and the width of surface excavation is 50 feet, which dimensions continue to station 616. Beginning with station 617 the width of bottom excavation is 30 feet, and width of surface excavation is 40 feet, which dimensions continue to station 650. Beginning with station 651 the bottom excavation is 20 feet, and surface excavation is 30 feet, which dimensions continue to station 915. Beginning with station 916 the width of bottom excavation is 16 feet and width of surface excavation is 26 feet, which dimensions continue to station 946 which is the beginning of upper end of said proposed drain. That the depth of actual cut in feet and inches ranges throughout said drain from 15.6 feet through the length of the drain.

"13. These plaintiffs further allege that the territory proposed to be drained by the construction of the aforesaid 'Flint river drain' and which territory is proposed to be assessed for benefits for the construction of said drain, embraces 132,000 acres. * * *

"15. These plaintiffs further allege that if said 'Flint river drain' is allowed to be constructed, that it will greatly increase the flow of water onto these plaintiffs, particularly in time of high water. That the construction of said drain will increase the amount of flood waters poured upon these plaintiffs and by thus raising the amount of water will increase the size of the district flooded in time of high water and will extend the length or period of the flood in point of time by adding to the water thereof. That the construction of said drain will not only increase the amount of water coming down the Flint river, but by reason of the deepening, widening and straightening of the channel of the Flint river within the limits of said drain proposed to be constructed, will greatly increase the rapidity of the flow thereof, thus increasing the height of the flood upon these plaintiffs. That if said drain is constructed it will cause these plain-

tiffs great, untold and irreparable damage by tearing out and destroying the county roads and county bridges of said county of Saginaw, adjacent to the said Saginaw and Flint rivers; by washing out and destroying the highways, bridges, and culverts owned by the plaintiff townships adjacent to the said Flint and Saginaw rivers, and by washing out and destroying and injuring the bridges and approaches thereto, the streets, pavements, sewers, gutters, water mains and water works and appurtenances thereto owned by the said city of Saginaw across, adjacent to, and in the vicinity of the said Saginaw river; by flooding and destroying the farm lands, buildings, and property of the said Horace E. Sloan, and by flooding and destroying the property, buildings, machinery, and merchandise of the said the Henry Passolt Company."

The defendants answered the bill of complaint admitting that the proposed drain was to be constructed as stated, but denied that any such disastrous results as were averred in the bill of complaint would follow.

Accompanying the answer was a motion to dismiss the bill of complaint for many reasons; the important ones stated are:

1. That there is no right of priority in the use of a river for drainage purposes, plaintiffs gaining no rights over defendants by first constructing their sewers, drains and ditches.
2. That plaintiffs have no right that any court should protect in the construction of bridges, sewers, and highways which interfere with the passage of the waters from above, either at normal or flood times.
3. The prime natural use of a river is a carrying away of the water from the higher parts of the country, and not for bridges and highways which may serve to impede the natural use of such streams.
4. That the attempted monopolization of the Saginaw river by plaintiffs is not only an interference with natural and legal rights, but conflicts with sound public policy.
5. The Saginaw river is a navigable stream, so recognized by the Federal government and this Commonwealth, with established dock lines, floating large

freighters and traversed by steamships of thousands of tons burthen, and having capacity in depth to accommodate all craft afloat upon the Great Lakes.

6. The capacity rule does not apply to Saginaw river.

The motion to dismiss was overruled and the case is brought here by appeal.

We quote from one of the briefs:

"Inasmuch, therefore, as the bill of complaint in this case cannot be amended, any new original bill drafted, or any proofs given that will entitle plaintiff to any part of the relief sought, it would be useless to put the parties to the needless expense of long weeks of taking testimony to make volumes of matter to cumber the records of this court in useless litigation."

This position is taken upon the theory that the proposed improvement is a lawful one, and if, as a result of the making thereof, harm comes to those individuals or municipalities situated on the lower reaches of the river, that they are remediless. Counsel cite and quote from many cases, among them *Crawford* v. *Rambo*, 44 Ohio St. 282 (7 N. E. 429); *Eastern Oregon Land Co.* v. *Irrigation Co.*, 201 Fed. 203 (119 C. C. A. 437); *Cairo, etc., R. Co.* v. *Brevoort*, 62 Fed. 129; *New York, etc., R. Co.* v. *Hamlet Hay Co.*, 149 Ind. 344 (47 N. E. 1060, 49 N. E. 269); *Kankakee, etc., R. Co.* v. *Horan*, 131 Ill. 288 (23 N. E. 621); *Chicago, etc., R. Co.* v. *People*, 212 Ill. 103 (72 N. E. 219); *Mason* v. *Fulton County Com'rs*, 80 Ohio St. 151 (88 N. E. 401, 24 L. R. A. 903, and note); *Mizell* v. *McGowan*, 129 N. C. 93 (39 S. E. 729); *Waffle* v. *Railroad Co.*, 53 N. Y. 11, counsel quoting from the last named case as follows:

"This gave no right of action to the plaintiff. The defendant had an absolute right to drain the surface water upon its land into the stream which was its natural outlet through ditches constructed upon

its own land, although the quantity of water in the stream was thereby increased in times of high water and diminished at other times (Angell on Watercourses [6th Ed.], §§ 108*a* to 108*s*). The authorities of this country and England upon this subject are collected and revised by the author, and clearly establish the right claimed by the defendant. (*Goodale* v. *Tuttle*, 29 N. Y. 459; *Rawstron* v. *Taylor*, 11 Exch. 369; *Gannon* v. *Hargadon*, 10 Allen [Mass.], 106; *Miller* v. *Laubach*, 47 Pa. 154.) A proprietor having the right to reclaim his land by draining the surface water therefrom by ditches discharging into a stream running thereon which is the natural outlet for the water, the object of doing so, whether for the erection of buildings, agriculture or constructing a railroad thereon, is wholly immaterial. He may so drain whenever disposed to do so, irrespective of the object."

Counsel say Michigan is in harmony with these cases. We quote from the brief of counsel:

"Michigan has adopted this rule, as appears from *Boyd* v. *Conklin*, 54 Mich. 583; *Leidlein* v. *Meyer*, 95 Mich. 586; *Horton* v. *Sullivan*, 97 Mich. 282; *Launstein* v. *Launstein*, 150 Mich. 524, as have also the States of Alabama, California, Illinois, Iowa, Louisiana, North Carolina, Ohio, Pennsylvania, South Carolina, and Tennessee, and some other States.

"The application of the rule was early applied in Michigan in the case of *Treat* v. *Bates*, 27 Mich. 390, where Judge CAMPBELL in the opinion said:

"'There can be no doubt of the right of the riparian owner to drain his own land through his own land into the adjoining stream. And it is equally clear that unless he has parted with it, he has the right to the stream in its natural flow, and a right to prevent any such interference with the natural flow as will work material injury to any of his legal privileges. It can make no difference whether the injury to his premises will be greater or less than if he had chosen to leave them in a state of nature if the encroachment is not warranted. He has a full claim to be protected in any lawful use of his own possessions.'

"The court applied the rule as heretofore stated in *Leidlein* v. *Meyer*, *supra*, wherein it is stated in the opinion:

"'As already intimated, we think the proofs hardly sustain the allegation of a well-defined watercourse. If there was such a watercourse then the plaintiff's right to its use under all the authorities would be undoubted. * * * Under it (the declaration) a recovery could be had whether the proofs showed a natural watercourse, well-defined, or whether it was an artificial one to which the plaintiff had obtained a right by user, or whether there was a natural flow over land without a channel, natural or artificial.'"

An examination of these cases will show that they do not meet the case stated in the bill. If the defendants were riparian proprietors who were simply draining their lands for purposes of agriculture, health, or other lawful purposes into a natural stream there is no doubt the authorities would justify them in doing so. In the instant case large numbers of people, some of whom are riparian owners and some of whom are not, are proposing to drain into the upper reaches of a river not in its natural state, but they are proposing to change the river bed itself in a very marked degree, and, the plaintiffs say, to their great harm. We do not think such a situation can be disposed of as a matter of law. At least we have had no authority called to our attention that warrants such a disposition of the case.

Counsel say there is another proposition that will sustain the motion to dismiss; we quote from the brief:

"Less than three per cent. of the flood waters at Saginaw come from the Flint river drainage district. The improvement could not possibly increase the flow more than two per cent., and in all probability the increase, if any, would be much less than one per cent. To say that such a small per cent. will cause a merciless devastation and utter destruction of large portions of the city and county of Saginaw goes far beyond the bounds of reason, and such assertions are not facts which bind the defendants or the court on this hearing. The bill alleges that 132,000 acres are to be drained by the proposed improvement. It also

shows that the watershed draining through Saginaw river comprises upwards of 6,000 square miles. It thus appears that the drainage district is only about one-thirtieth of the watershed of the Saginaw river. The natural flow of Flint river in normal times and in times of freshets is now running into the Saginaw river, and it is only the increased flow over and above what it now is, that is, or can be, involved in this litigation. No inference of more than nominal damage can reasonably be drawn from the facts alleged."

There are so many elements that enter into the question of when damage will be caused by an augmentation of the flow of water or what will be the effect of changed conditions, that we are not inclined to dispose of the case upon the averments of the bill of complaint and the motion to dismiss, but think the case should be heard after the proofs are taken.

The order overruling the motion to dismiss is affirmed, with costs, and the case will be remanded for further proceedings.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

GAFFNEY *v.* BLIVEN.

CANCELLATION OF INSTRUMENTS—DEEDS—UNDUE INFLUENCE.

On a bill by the daughters of grantor to set aside a deed of a farm to defendant, their sister, on the ground of false and fraudulent representations and undue influence on the part of defendant, testimony *held*, insufficient to establish plaintiffs' case.

See note in L. R. A. 1916B, 18.

Appeal from Wayne; Mandell, J. Submitted June 13, 1918. (Docket No. 39.) Decided September 27, 1918.

Bill by Clara S. Gaffney and others against Josephine Bliven to set aside a deed. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Charles C. Conklin and *Edward C. Moran* (*Thomas A. E. Weadock*, of counsel), for plaintiffs.

Walter Barlow and *Leon D. Barlow*, for defendant.

MOORE, J. From a decree dismissing the bill of complaint this case is brought here by appeal. Catherine Shefferly, a widow, died on the 27th day of October, 1904. She was the mother of Charles Shefferly, Mary Keenan, Josephine Bliven, Catherine Sheehan, Lena Sheehan, and Clara Gaffney, all of whom survived her. She owned a farm of 38 acres, on which there was a mortgage which, principal and interest, amounted to about $2,500. On October 24, 1904, Catherine Shefferly made a quitclaim deed of the farm to Josephine Bliven. The bill of complaint in this case was filed October 22, 1915. We quote from the brief of appellant:

"The bill of complaint was originally filed to declare the deed a trust deed and the defendant Josephine Bliven, a trustee, holding a deed of the farm owned by Catherine Shefferly during her lifetime in trust for the benefit of her sisters, the other daughters of Catherine Shefferly, and that an equitable division of the farm be made between all the daughters of Catherine Shefferly.

"An amended bill of complaint was filed during the progress of the trial in the court below, praying that the deed dated on the 24th day of October, 1904, executed by Catherine Shefferly conveying the property to Josephine Bliven be set aside and held for naught, because of the false and fraudulent representations

made by defendant to Catherine Shefferly by means of which defendant obtained title of said farm."

The case is discussed in this court at considerable length under the following heads:

1. The effect of the so-called oral "family compact" alleged in the original bill upon the validity of the deed in question.
2. The subject of fraudulent representations and undue influence, if any, alleged by the two remaining plaintiffs in the case to have been practiced by the defendant to induce Catherine Shefferly, her mother, to convey the lands in question to said defendant.
3. The laches of the plaintiffs in filing their bill herein.
4. The validity of the amended bill of complaint allowed by the court on the hearing in the court below.

Without following this order of discussion we think the question of fact will decide the case. The scrivener who drew the deed testified in part as follows:

"I knew Mrs. Catherine Shefferly as long as I can remember. That is the deed, Exhibit 1, dated October 24, 1904, which I made for her. I had known her practically all of my life up to the time this deed was made. We were young together and lived in the same vicinity. After she was grown up and married we lived in the same neighborhood. * * *

"*Q.* What was the condition of her mind on the day this deed was made?

"*A.* Well her mind was— I think she was very sick all right, she was very sick. She was in bed and she was very sick, but I found her in her mind just about the same as she was right along every time I met her. I met her occasionally off and on. And I asked her when I first came in, I asked her how she was and she says, 'I am very sick.' I says, 'Did you send for me?' She says, 'Yes, I did.' 'Well,' I says, 'I came, now anything I can do for you I will do it.' Then I told her, 'Don't get excited, if you want to say anything keep very quiet.' She says, 'I will, I can talk'— and she went on and told me that she wanted me to write out a deed. She said she wanted to deed her place to Josephine. (Objected to.)

"*A.* And she said, 'Josephine had no home, never had a home, her other children all had homes, and I always wanted to give her a home. I want to deed her my place here. I am sorry I can't deed her a home without debts but I have got to do the best I can.' And I told her not to feel that way and whatever she wished to do and all that she could do and it was all right. And I stepped into the other room and drew up the deed and asked Mrs. Gaffney if she would sign as a witness.

"*Q.* That is one of the complainants in this case that Mrs. Gaffney?

"*A.* Yes, sir."

There was testimony offered on the part of the plaintiff to the effect that the deed was made to Mrs. Bliven upon the agreement that she was to divide the property with her sisters. This is denied by Mrs. Bliven.

The record fairly shows that Mrs. Shefferly was competent to make the deed. It shows the land conveyed was worth in the neighborhood of $4,500, incumbered with a mortgage, principal and interest, of about $2,500. It shows that Mrs. Bliven has paid debts of her mother and funeral and other proper expenses amounting to about $800, and reduced the mortgage to about $1,000. It shows that the son had already had 20 acres of the home farm and that each of the daughters had comfortable homes except Mrs. Bliven. The disposition of her small property by Mrs. Shefferly evidenced by the deed is a natural one. When the testimony, which is incompetent because equally within the knowledge of the deceased, Mrs. Shefferly, is eliminated, there is a failure to establish by a preponderance of evidence the case stated in either of the plaintiffs' bills of complaint.

The decree is affirmed, with costs.

BIRD, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred with MOORE, J. OSTRANDER, C. J., and BROOKE, J., concurred in the result.

WALLACE *v.* H. W. NOBLE & CO.

1. EVIDENCE—DAMAGES—ADMISSIONS—STOCK AND STOCKHOLDERS—WRONGFUL SALE.

   In an action for damages for the unauthorized sale of shares of stock, testimony as to a conversation between plaintiff and an officer of defendant corporation, in which plaintiff admitted that shortly before the trial he could have repurchased the stock, and that the difference between the price accounted for and what it would have cost him to repurchase was only $600, was admissible.

2. SAME—COMPROMISE—ADMISSIONS.

   The exclusion of said testimony cannot be justified upon the theory that it was an effort to compromise, since, if made, it was an admission of a material fact.

3. SAME—DAMAGES.

   Held, error to refuse to allow defendant to show what it would have cost plaintiff to repurchase the stock within a reasonable time after he had knowledge of its wrongful sale.

4. ESTOPPEL—RATIFICATION—QUESTION FOR JURY.

   In an action for damages for the unauthorized sale of shares of stock, where defendant claimed that plaintiff was estopped by a letter which he had written ratifying the sale, which plaintiff denied, claiming defendant had not fully and correctly informed him as to the facts at the time the letter was written, the question was for the jury.

5. DAMAGES—STOCK AND STOCKHOLDERS—WRONGFUL SALE.

   Plaintiff is entitled to recover upon the basis of the highest market price reached by stock between the time of its wrongful sale and the expiration of a reasonable time to enable him to purchase other shares on the market.

6. SAME—MISCARRIAGE OF JUSTICE—STATUTES.

   If plaintiff, by the expenditure of $600 or $800, within a reasonable time could have placed himself *in statu quo*, a judgment of $3,500 cannot be sustained under section 28, chap. 50, Act No. 314, Pub. Acts 1915 (3 Comp. Laws 1915, § 13763), upon the theory that there was no injustice.

See note in 50 L. R. A. (N. S.) 1046.

Error to Wayne; Brown, J., presiding. Submitted June 6, 1918. (Docket No. 43.) Decided September 27, 1918. Rehearing denied January 31, 1919.

Assumpsit by Newell B. Wallace against H. W. Noble & Company for breach of a contract for the sale of corporate stock. Judgment for plaintiff. Defendant brings error. Reversed.

Charles F. Delbridge, for appellant.

Lucking, Helfman, Lucking & Hanlon, for appellee.

MOORE, J. This action was brought to recover damages for an alleged breach of contract in the unlawful sale in April, 1915, by defendant of 20 shares of stock of Ford Motor Company, Ltd., of Canada. From a judgment in the sum of $3,500 in favor of the plaintiff the case is brought here by writ of error. The trial judge in overruling a motion for a new trial made so complete a statement of the issues involved that we quote therefrom as follows:

"This was an action of assumpsit brought in the summer of 1915 by Newell B. Wallace against H. W. Noble & Company, a corporation, for damages for the breach of a certain written contract entered into between the parties on or about October 7, 1913. This contract provided among other things substantially that the parties to the contract should purchase 25 shares of the stock of the Ford Motor Company of Canada, Limited, at $550.00 per share, making a total purchase price of $13,750.00. It was provided that the stock should be carried until by mutual agreement the parties disposed of it. The contract was signed by both parties and pursuant thereto the 25 shares of stock were purchased in two lots, one of 5 shares and one of 20 shares. It appeared, however, that the defendant in the case actually paid $10,890.00 for the 20-share lot instead of $11,000.00, there being a commission of $110.00 charged in this transaction by the defendant of which fact plaintiff apparently had no

knowledge until the trial of this case. The 25 shares of Ford stock, together with 20 shares of the stock of the Union Trust Company, then owned by plaintiff, were deposited as security with the Wayne County & Home Savings Bank in Detroit and a loan was there obtained of sufficient money to pay the original purchase price of the 25 shares of Ford stock.

"It is undisputed that on or about August 14, 1914, by the mutual consent of both plaintiff and defendant, 5 shares of the original purchase were sold and the proceeds duly accounted for by defendant. It is also undisputed that at one time the bank required a payment of $500 upon the loan in addition to the collateral owned by plaintiff which it held and that this sum of $500 was advanced as provided in said contract by the plaintiff to the defendant, and paid to the bank as requested.

"The remaining 20 shares of Ford stock were carried in the joint account until on or about April 6, 1915, when defendant, without the knowledge or consent of plaintiff, and in violation of said contract, and without giving any notice to plaintiff, sold all the remaining 20 shares of Ford stock. Defendant accounted to the plaintiff on the sale of these remaining 20 shares at the rate of $685.00 per share, in addition to a dividend of $30.00 per share which had been declared by the officials of the Ford Company on or about April 5, 1915. It is not exactly clear at what price these shares were actually sold, although the defendant produced evidence to show that part were sold at $675.00 per share and the balance at $700 per share. This unauthorized sale of 20 shares is the one of which plaintiff complains and for which he claims damages.

"It is undisputed that plaintiff, at the time of the alleged unauthorized sale and for sometime prior thereto, had been out of the State, he then being a salesman for D. M. Ferry & Company and traveling in various parts of the United States. Between the time of the sale, namely, April 6, 1915, and April 30, 1915, Mr. Albert Nebe, one of the defendant's salesmen, who had knowledge of the transaction whereby the Ford stock above mentioned was held by the parties on joint account, wrote several letters to plaintiff,

which letters in general spoke highly of the stock of the Ford Motor Company of Canada and led plaintiff to believe that the stock would continue to increase in price. Finally, about the end of April, plaintiff wrote a letter in which he commented upon the profits that would be made by the parties by holding the Ford Company stock until a higher price was obtained. In reply to this letter, Mr. H. W. Noble, the chief stockholder in the defendant company, wrote the plaintiff under date of April 30, 1915, and informed him that the stock had been sold and offering certain explanations why the stock had been sold. On or about May 4, 1915, plaintiff wrote a letter apologizing for the tone of his previous letter and apparently ratifying the alleged unauthorized sale. It is undisputed that plaintiff was not notified of the sale of the stock prior to the letter of Mr. H. W. Noble of April 30, 1915.

"Defendant claimed that plaintiff was estopped to claim any damages by reason of the letter of May 4th above mentioned, and plaintiff claimed that when he wrote this letter he did not have such a full, correct, and complete statement of the facts as it was the duty of defendant to furnish, and therefore the alleged ratification and estoppel was of no validity."

We shall not attempt to discuss all of the appellant's 197 assignments of error which he groups in his brief under three heads, as follows:

First, those pertaining to the court's failure to direct a verdict; *second*, those pertaining to various rulings throughout the taking of the testimony, tending to prejudice the defendant's case before the jury; and, *third*, those pertaining to the court's rule of damages, especially as to reasonable time.

As to the first of these groups we shall content ourselves with saying that we think there was a case to be submitted to the jury under proper instructions.

Was there error in the rulings in relation to the admission of testimony? Defendant sought to show a conversation Mr. Noble had with the plaintiff in which plaintiff admitted that shortly before commenc-

ing suit on July 31, 1915, he could have repurchased the stock and that the difference between the $685 per share accounted for to him by defendant, and what it would have cost plaintiff to have repurchased after he had knowledge that the stock had been sold without his consent, was only $600. The exclusion of this testimony is sought to be justified upon the theory that it was an effort to compromise; we think, if made, that it was more than an effort to compromise; it is an admission of a material fact and the testimony should have been allowed.

We also think it was error to refuse to allow the defendant to show what it would have cost the plaintiff to repurchase the stock within a reasonable time after he had knowledge of its wrongful sale. We do not think it could be said as a matter of law that plaintiff was estopped by his letter of May 4, 1915, and that for that reason a verdict should have been directed. See *Blount* v. *Eames*, 150 Mich. 35; *Coffey* v. *McGahey*, 181 Mich. 225.

The appellant offered 49 written requests to charge, among them was one reading:

"Plaintiff, when he learned that his interest in the stock had been sold without his consent, if you find such sale was contrary to the terms of the agreement, was entitled at that time, to demand and receive from the defendant ten shares of stock in the Ford Motor Company, Ltd., of Canada, together with a sum equal to the dividends and interest thereon, declared subsequent to such wrongful sale, and in lieu thereof, the plaintiff was entitled to demand and receive from the defendant such a sum of money as would enable the plaintiff to go into the open market and buy ten shares of such stock within a reasonable time thereafter."

The court charged the jury upon that subject as follows:

"The measure of damages in stock transactions of this kind is the difference between the amount re-

ceived and the highest intermediate value reached by the stock between the time the plaintiff had information of the wrongful acts complained of, and a reasonable time thereafter to be allowed to plaintiff to place himself in the position he could have been in, had not his rights been violated.

"Now a reasonable time is such a period of time as would be a reasonable time in which to make a sale of stock held in joint account such as this; after one of the parties thereto makes a demand upon the other that the stock be sold, and in considering what would be a reasonable length of time, you must consider all the circumstances surrounding the case—not how quickly stocks could have been bought or sold, but what would be a reasonable length of time for him to wait before consenting to make sale of a joint account after demand had been made that he make a sale. A reasonable time would be the time which would elapse after notice to sell to the time when he could be legally required to make the sale."

Counsel for the appellee cite in support of the charge *Hubbell* v. *Blandy*, 87 Mich. 209; *Wright* v. *Bank of the Metropolis*, 110 N. Y. 237 (18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356); *Galigher* v. *Jones*, 129 U. S. 193 (9 Sup. Ct. 335); *Wilson* v. *Mining Co.*, 227 Fed. 720 (142 C. C. A. 245), and other cases. So far as these cases are applicable to the instant case, they do not sustain the charge of the court but are favorable to the contention of appellant. No case is cited by counsel on either side which is on all fours with the case we are now considering, but the principle involved was before this court in *Vos* v. *Child, Hulswit & Co.*, 171 Mich. 595 (43 L. R. A. [N. S.] 368), in an opinion written by Mr. Justice BIRD, who quotes with approval from the opinion of Mr. Justice Sanborn, in *McKinley* v. *Williams*, 74 Fed. 94 (20 C. C. A. 312), to the effect that though the general rule as to the measure of damages for failure to deliver ordinary personal property, according to a contract for purchase and sale, or for its conversion, is the value

of the property at the time it is to be delivered, or at the time it is converted (the act of conversion being on rightful demand wrongfully refused), nevertheless this general rule is subject to an exception in the case of shares of stock which are subject to frequent and wide fluctuations in value, and that the plaintiff should be permitted to recover the highest market value which the stock attains between the time of its conversion and the expiration of a reasonable time to enable the owner to put himself *in statu quo* after notice to him of the conversion. The case is so recent and so accessible that we content ourselves with this reference to it.

Counsel invoke section 28 of chapter 50 of Act No. 314, of the Public Acts of 1915, known as the judicature act (3 Comp. Laws 1915, § 13763), to sustain the judgment in this case upon the theory that no injustice has been done the defendant. If it is true, as claimed by the defendant, that plaintiff, by the expenditure of six or eight hundred dollars, within a reasonable time could have placed himself *in statu quo*, we do not think it can be said that a judgment in his favor of $3,500 is not an injustice.

For the reasons stated the judgment is reversed, with costs to the defendant, and a new trial ordered.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

GNAU v. FITZPATRICK.

DEEDS—BUILDING RESTRICTIONS—INJUNCTION—EQUITY.

Where lots were sold with the restriction of a single dwelling with the necessary outbuildings on each lot, and as originally platted the lots were 60 feet wide, and plaintiff purchased one lot and 20 feet adjoining of another lot, and defendants purchased 50 feet each of the remaining 100 feet, of three lots, upon which they were proposing to build two houses, the plaintiff having already built one house upon his 80 feet, the effect being that there would be but three houses upon the three lots, there was no such violation of said restriction as would appeal to a court of equity, in injunction proceedings to restrain defendants from proceeding to build. BIRD, BROOKE, and KUHN, JJ., dissenting.

Appeal from Wayne; Codd, J. Submitted June 14, 1918. (Docket No. 97.) Decided September 27, 1918.

Bill by George J. Gnau and others against Patrick Fitzpatrick and another to enjoin the violation of certain building restrictions. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Monaghan, Monaghan, O'Brien & Crowley (*Hinton E. Spalding,* of counsel), for plaintiffs.

McNamara & Scallen, for defendants.

MOORE, J. The trial judge stated the questions involved in this litigation as follows:

"George J. Gnau and others, plaintiffs, all of whom are residents on Boston boulevard, east, filed their bill to enjoin defendants from proceeding with the construction of two private dwellings on property situated on the southeast corner of Boston boulevard east and Brush streets, alleging that the erection of said homes were to be in violation of building restrictions imposed upon defendants' property. This property is

See note in 45 L. R. A. (N. S.) 726.

platted as part of McLaughlin and Owen subdivision, one-quarter section 37, 10,000-acre tract, Detroit.

"The subdivision was platted in 1893, and in 1898 the Park Hill Land Company, Ltd., a Michigan partnership association, became possessed of the property. Thereafter the lots were sold by said Park Hill Land Company and in each instance restrictions were incorporated, excepting that lot 11, which was conveyed by the Park Hill Land Company on January 6, 1899, did not contain the restrictions. Subsequently, however, on March 25, 1905, when this lot was again conveyed, the restriction was included. Consequently, although there is not a general restriction in its entirety, there is, at the present time, a restriction on each lot, not due to a general restriction against the entire street, but imposed at different times by different grantors. The terms of said restriction are fully set forth in plaintiffs' bill.

"Defendants Patrick Fitzpatrick and William J. Ross acquired their property on the 19th day of July, 1917, from a common grantor, Earl I. Heenan, defendant Ross receiving a deed to the easterly 50 feet of lot 50 and defendant Fitzpatrick receiving a deed to the westerly 10 feet of lot 50 and the easterly 40 feet of lot 51. The remaining 20 feet of lot 51 or the westerly 20 feet of said lot is owned by plaintiff Gnau, together with lot 52 which joins lot 51 on the west.

"The plaintiffs claim that by reason of the fact that defendants each own 50 feet of ground instead of an entire lot as originally subdivided, the erection of their homes is in violation to the spirit and letter of the restrictions.

"The existence of the restriction and its terms is not disputed.

"Plaintiffs contend that the words of the restriction: 'There shall be nothing but a single private dwelling with the necessary outbuildings erected on each lot,' are to be construed to mean that an entire lot as originally subdivided comprises one building site only. It is my opinion that the above wording of restriction is merely to limit the number of structures that may be placed on a single lot, to distort the language of the restriction to conform with plaintiffs' contention, it would be necessary to state it thus:

'Nothing but a single lot shall be used for the erection of a private dwelling,' etc. It is very apparent that this is an entirely different proposition.

"Plaintiffs further contend that plaintiff Gnau, by the purchase of 20 feet of lot 51, became the dominant owner, so to speak, of the entire lot, and that in order for any one to deal in any way with the remainder of the lot, the consent of plaintiff Gnau must be secured. This court does not recognize any such doctrine and will not lend its aid in enforcing it. From the very nature of the restriction, in its unmistakable wording, it would be impossible for this theory to prevail, for in this case it would be possible for plaintiff Gnau by the purchasing of a minor portion of this valuable lot, to arbitrarily enjoin defendant Fitzpatrick owning the entire balance of said lot from the free use of its possession. This theory is not only unjustified in law, but contrary to public policy, as it would permit persons to dictate to the owner of large tracts of land by the purchase of a few feet or even less.

"It does not appear to me that there is any question as to the intent of the parties as to the meaning of the restrictive covenant. It was, as has been before stated, to limit the number of structures that an owner may place upon one lot. The clear and unmistakable language of the restriction controverts the possibility of any other intent. There are no limitations in the restriction as to the number of feet necessary to build a residence on, nor does it say, as plaintiffs contend, that a full lot must be owned in its original state as subdivided by any one contemplating building. The language seems to me explicit and nothing can be written into a restriction or implied from the fact that plaintiff Gnau claims to have created one building site by procuring an additional 20 feet of lot 51 to add to his holdings. The testimony does not show that defendants' plans will violate any of the restrictions in this property. * * *

"There will be, after the defendants complete their private homes, but one single private dwelling on lot 51, and there will be but a single private dwelling on lot 50, which is strictly in accord with the terms and provisions of the restrictions. * * *

"A decree may be entered dismissing the bill of complaint for the foregoing reasons, with costs to be taxed."

A decree was entered in accordance with the opinion. The case is brought here by appeal.

The restrictions applicable to the lots in the instant case read:

"In the block between John R and Brush streets, the building line shall be 45 feet back from the front lot line and no dwelling shall be nearer the front lot line than these limitations prescribe, and no dwelling or other structure shall be set nearer than 10 feet to the west lot line of any lot. * * *

"There shall be nothing but a single private dwelling with the necessary outbuildings erected upon each lot. * * * No residences less than two stories in height are permitted. The cost of residences to be erected on said lots shall be as follows: * * * for those between John R and Brush street, $6,500 or more * * * *Provided,* that more than one lot is purchased for a single homestead, the purchaser will not be required to erect more than one residence on said lots."

We quote from the brief of the appellants:

"The plaintiffs contend that the defendants are violating both the letter and spirit of the restrictions imposed upon their land. They are attempting to create two 50-foot lots. The plaintiffs urge that the defendants have attempted by this to create a subdivision of the original plat so far as it concerns their property, and thus create two building sites from what had originally been one building site and a fraction of another. If they are permitted to continue with their present plans, an effectual subversion of the original plan of improvement on the streets will necessarily result. * * *

"It is apparent from the building restrictions imposed upon this subdivision that the original owners of it planned to create a high-class residential district. They imposed the same restriction upon every lot on the street. We are stating an obvious fact when we say that uniformity is the first essential in creating

a district of this type. The covenant contained in the various deeds requires uniformity in the front building line, prescribes in a uniform way the nearest distance that the buildings can be placed from the west lot lines on the various lots and prescribes uniformity in the general quality and minimum cost of the residences to be erected. The entire purpose of the restriction is obvious from a mere reading of it.

"The meaning of the restriction is likewise free from doubt or ambiguity. The restriction provides that nothing but a single private dwelling with the necessary outbuildings can be erected upon each lot. The exact language of that part of the restriction to which we refer is as follows:

"'There shall be nothing but a single private dwelling with the necessary outbuildings erected upon each lot.'

"This can have but one meaning, namely, that an entire lot as shown upon the plat comprises one building site. A fraction of a lot of itself, therefore, would not constitute a building site. It is necessary therefore for a person who desires to possess a building site to acquire and own one full lot at least."

In his oral argument it was the claim of counsel for the plaintiff that if the owner of the middle lot of three lots acquired a small strip from the lots on each side of him that the owners of the remaining portions of those two lots could not build on their lots without his consent, thus resulting in but one residence on three lots. If an observance of the spirit of the restrictions would bring out such a result we think it would prevent the owner of a residence from buying a fractional part of a lot and that if he wanted more than one lot he should buy, not a fraction of a lot but a full lot. When defendants have done what they propose to do there will be but one residence on lot 50 and but one on lot 51. Neither residence will be within ten feet of the west line of the lot and will comply with the other restrictions.

The plaintiffs are in a court of equity. It does not

appeal to our sense of the province of that court to give them the relief they ask.

The decree of the lower court is affirmed, with costs.

OSTRANDER, C. J., and STEERE, FELLOWS, and STONE, JJ., concurred with MOORE, J.

BROOKE, J. (*dissenting*). I am unable to agree with the conclusions reached by my Brother MOORE in this case. The essential provisions of the restrictions are that:

"No dwelling or other structure shall be set nearer than ten feet to the west lot line of any lot,"

and that:

"There shall be nothing but a single private dwelling, with the necessary outbuildings, erected upon each lot."

The defendant Fitzpatrick proposes to erect a dwelling house on a piece of ground made up of the easterly 40 feet of lot 51 and the westerly 10 feet of lot 50. Lots 50 and 51 are each platted 60 feet in width. There can be no doubt that it was the intention of those who created the restrictive covenant to provide that not less than 60 feet should be occupied for each dwelling and its appurtenant structures. The fallacy of my Brother's argument is apparent if we assume that Mr. Fitzpatrick had purchased none of lot 50 and only the easterly 30 feet of lot 51 and had attempted to erect upon that 30 feet his residence. In such case, as now, he would have satisfied the exact language of the restriction, according to the reasoning of my Brother, because his residence would be the only residence on lot 51 and would be more than 10 feet east of the westerly line of lot 51. It seems to me quite apparent that in such a case any court clothed with equitable jurisdiction would enjoin the defendant Fitzpatrick from proceeding. What he proposes to do

now is, in principle, exactly what he would propose to do in the case supposed. He now proposes to use 50 feet for his residence instead of 30 feet in the supposed case, while the platted lot is 60 feet wide. The paramount rule for the construction of restrictive covenants is that effect shall be given to the actual intent of the parties, if that be possible, without doing violence to the language used. A restrictive covenant which recites that:

"There shall be nothing but a single private dwelling, with the necessary outbuildings, erected upon each lot,"

certainly cannot mean that a single private dwelling can be erected upon a strip of ground less than a lot as platted. The record contains abundant testimony to the effect that wide lots, affording opportunity for proper landscaping about residences, tend to increase the value of residential property, and that narrow lots, where the houses are built close together, tend to reduce such value. It is defendant Fitzpatrick's intention to erect a structure within five feet of his westerly lot line, whereas the restrictive covenant is that:

"No dwelling or other structure shall be set nearer than ten feet to the west lot line of any lot."

According to the reasoning of my Brother MOORE, Mr. Fitzpatrick satisfied this restriction by asserting that the westerly 20 feet of lot 50, which he does not own, but which is owned by the complainant Gnau, may be used by him in the computation. This, it seems to me, is manifestly inequitable.

Again, suppose that Mr. Fitzpatrick was the owner of the westerly 30 feet of lot 50 and the easterly 30 feet of lot 51 and desired to erect a building thereon. Construing the restrictive covenant that:

"No dwelling or other structure shall be set nearer than ten feet to the west lot line of any lot,"

as my Brother does, Mr. Fitzpatrick would be obliged to erect his dwelling ten feet east of the center line of the plot owned by him upon the easterly twenty feet of the lot, leaving 40 feet to the west unoccupied. The word "lot" in the restrictive covenant quoted should be held to mean the building site or premises about to be improved. Given this construction in the case at bar Mr. Fitzpatrick would be obliged to erect his house ten feet from the westerly line of the property owned by him. This he cannot do because his structure as at present planned reaches to the very easterly limit of the lot he owns.

The construction placed upon the restrictions by the other owners upon this street, none of whom have attempted to replat the lots and place residences on less than a single lot, has been uniform. While this construction may not be absolutely controlling, it should receive great weight in determining the true meaning of the covenant in question.

I am of the opinion that the injunction should issue as prayed.

BIRD and KUHN, JJ., concurred with BROOKE, J.

BUVIA v. OSCAR DANIELS CO.

BOISSINEAU v. SAME.

CENNELL v. SAME.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERSONAL INJURIES—OUT OF EMPLOYMENT—COURSE OF EMPLOYMENT.
   In order to entitle the injured employee to compensation under the workmen's compensation act, the injury must arise out of, as well as in the course of, the employment.

2. SAME.
   An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

3. SAME—PERSONAL INJURIES—OUT OF EMPLOYMENT.
   Where three employees, while waiting for a boat to leave, so that another boat from which they were to unload mixer wings could move up to its proper place at the dock, out of curiosity, walked over to where a city scavenger was dumping refuse into a hole in the dock, when dynamite caps mixed in with the rubbish exploded, killing one and injuring the other two, the accident did not arise out of their employment; their duty to their master neither requiring nor warranting them in wandering from the scene of the contemplated operation.

4. SAME—INJURY PECULIAR TO EMPLOYMENT.
   An injury to an employee resulting from a risk common to the general public is not covered by the workmen's compensation act.

Certiorari to Industrial Accident Board. Submitted June 5, 1918. (Docket Nos. 27-29.) Decided September 27, 1918. Rehearing denied January 31, 1919.

Frank Buvia, Joseph Boissineau and Belle Cennell, administratrix of the estate of Thomas Cennell, deceased, presented their claims for compensation

See notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

against the Oscar Daniels Company for injuries and the accidental death of Thomas Cennell in defendant's employ. From orders awarding compensation, defendant and the Employers' Liability Assurance Corporation, insurer, bring certiorari. Reversed, and awards set aside.

Davidson & Hudson (*F. T. Witmire,* of counsel), for appellants.

Albert E. Sharpe, for appellees Cennell and Buvia.

Wiley & Green, for appellee Boissineau.

These three cases all grow out of the same accident in which Thomas Cennell, husband of Belle Cennell, claimant, lost his life and claimants Joseph Boissineau and Frank Buvia were injured. The three men were at the time of the accident employees of the Oscar Daniels Company. On May 15, 1917, the three men were directed to take 13 iron mixer wings, weighing about 140 pounds each, from the dock of the Oscar Daniels Company, on the Fourth Lock at Sault Ste. Marie, to Brady Pier on the river front, where the wings were to be unloaded. The next morning the three men loaded the mixer wings from the dock of the Oscar Daniels Company onto the deck of the launch, "Ralph T," and proceeded to the Brady Pier on the river front for the purpose of unloading them. When they arrived at the pier they found that the United States buoy tender, "Clover," was moored opposite the point on Brady Pier where the Oscar Daniels Company was permitted to unload heavy material for transportation. They moored the "Ralph T" a short distance behind or east of the "Clover," but opposite the Brady Pier. This pier is built of concrete and is under control of the United States engineers' department. Immediately to the east of Brady Pier and adjoining it is an old wooden dock. Whether

when moored the launch, "Ralph T," was wholly in front of the concrete pier or lay partially opposite the wooden dock is a matter somewhat in dispute in the record. For the purposes of determination, however, the divergence of the testimony upon this point is insignificant. Having moored their boat, Cennell, who was the owner of the "Ralph T," ascertained by inquiry that the "Clover" would soon move out. He told the other two claimants that they would wait the 10 or 15 minutes until the "Clover" departed. While the three men were awaiting the departure of the "Clover" a city scavenger drove upon the wooden dock adjoining the Brady Pier and started to unload some rubbish through a hole in said dock at a point about 60 feet from the face of the dock and about 20 feet east of the east line of Brady Pier. The load of rubbish contained a large quantity of dynamite caps. The three men, apparently curious to watch the dumping of the scavenger wagon, walked in the direction of the point where it was being unloaded and must have reached a point very close to the wagon when an explosion of great violence occurred, resulting in the death of one member of the United States coast guard, two employees of the city scavenger, and of Thomas Cennell, husband of Belle Cennell, and in the injury of claimants Buvia and Boissineau. Neither the Brady Pier nor the wooden dock adjoining was owned or controlled by the Oscar Daniels Company. Liability having been denied by the Oscar Daniels Company, a committee on arbitration heard the matter and rendered a decision in favor of all three claimants, which was later affirmed on appeal to the industrial accident board. Defendants now review said awards in this court.

BROOKE, J. (*after stating the facts*). It is the contention of appellants:

1. That the injuries did not arise out of the employment.
2. That such injuries did not arise in the course of the employment in which claimants were engaged.

We have frequently held that, in order to entitle the injured person to compensation under the act, the injury must arise out of the employment as well as in the course of the employment. *Tarpper* v. *Weston-Mott Co.*, 200 Mich. 275, and cases cited. An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. *McNicol's Case,* 215 Mass. 497 (102 N. E. 697, L. R. A. 1916A, 306). The injury must be the result of one of the risks incident to the employment. Applying these rules to the case under consideration, how can it be said that the employment of Cennell, Boissineau and Buvia subjected them to the risk of death or injury from which they suffered? Their duties required them to load the mixer wings from defendant's dock on the Fourth Lock at Sault Ste. Marie and to transport them to Brady Pier and there unload them. Their duty to their master neither required them to, nor warranted them in, wandering from the immediate scene of the contemplated operation and gratifying an idle curiosity. The premises where the accident occurred, and where they had no business, were not under the control of their common master. The scavenger whose possible negligence caused the disaster was a municipal employee. We feel bound to determine therefore that the accident causing the injuries did not arise out of the employment. Assuming, however, that the presence of claimants in the vicinity of the scavenger's wagon was justified, which cannot properly be done, then in suffering death and mutilation from the explosion the

claimants were subjected to no greater or different risk than that sustained by every member of the general public within the zone of the blast. Three other persons were killed, one totally unconnected with the operation. An injury resulting from a risk common to the general public may not be compensated. *Hopkins* v. *Sugar Co.*, 184 Mich. 87 (L. R. A. 1916A, 310); *Worden* v. *Power Co.*, Mich. W. C. C., page 14, July 19, 1916. While the accident in the cases under consideration cannot be treated as "an act of God," as was the one considered in *Klawinski* v. *Railway Co.*, 185 Mich. 646, the argument sustaining the decision in that case is *a fortiori* applicable here. See, also, *Spooner* v. *Detroit Saturday Night Co.*, 187 Mich. 125. The two cases principally relied upon by claimants are *Kunze* v. *Detroit Shade Tree Co.*, 192 Mich. 435, and *Haller* v. *City of Lansing*, 195 Mich. 753. Neither is controlling or applicable to the facts in the cases under consideration. In the first case the claimant was injured while in the actual performance of his duties and in the second case the claimant was injured while within the ambit of his employment, actually upon his master's premises, and using such facilities as his master had provided.

The awards are set aside.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

HAMBURGER *v.* BERMAN.

1. EXCHANGE OF PROPERTY—FRAUD—ESTOPPEL—BREACH OF CONTRACT.

Where defendant dealt with property, received in an exchange of property, after discovering plaintiff's alleged false representations relating thereto, his conduct amounted to an affirmance of the contract, and the defense of fraud is not open to him in an action for its breach.

2. SAME—CONTRACTS—VALUES—DAMAGES.

Where an exchange of properties was contracted for, *held*, the values fixed in the contract by the respective parties upon the properties were mere estimates, and were so fixed merely for the purpose of effecting an exchange.

3. SAME—BREACH OF CONTRACT—LIABILITY.

Where defendant contracted to convey certain property, the legal title to which was in a corporation of which he was a minority stockholder, in exchange for other property, he was liable in an action for breach of the contract, on his failure to convey.

4. SAME—DAMAGES—VALUES AS TO DATE OF BREACH.

The true measure of plaintiff's damages was the amount lost through the failure of defendant to carry out his contract; the loss to be ascertained as of the date of the breach.[1]

5. SAME—DAMAGES—INSTRUCTIONS—TRIAL.

Where the court instructed the jury, on the question of damages, that they were to be governed by the evidence, and the witnesses had testified as to the values of the respective properties at or near the time of the breach, the failure of the court to instruct the jury to determine the values as of the date of the breach was not reversible error, in the absence of any preferred request upon that point.

Error to Wayne; Gilday, J., presiding. Submitted June 4, 1918. (Docket No. 8.) Decided September 27, 1918. Rehearing denied January 31, 1919.

Assumpsit by Harry B. Hamburger against Julius Berman for breach of a contract to exchange certain

[1]See note in 38 L. R. A. (N. S.) 465.

real estate. Judgment for plaintiff. Defendant brings error. Affirmed.

Robert M. Brownson, for appellant.

Butzel & Butzel (*Isadore Levin,* of counsel), for appellee.

Plaintiff brought suit to recover damages alleged by him to have been sustained by reason of the breach by the defendant of the following contract:

"Memorandum of agreement, made and entered into this first day of September, in the year one thousand nine hundred and fifteen, by and between Julius Berman of the city of Detroit, county of Wayne, and State of Michigan, as party of the first part, and Harry B. Hamburger of the same place, as party of the second part, witnesseth:

"In mutual consideration of the sum of one ($1.00), dollar to each of the parties hereto respectively paid by the other party, and in consideration of the terms and covenants herein contained, it is hereby agreed as follows:

"The said party of the first part hereby agrees to sell and convey unto the party of the second part the property situated on the northwest corner of Fort street west and Hubbard street, in the city of Detroit, county of Wayne and State of Michigan, same consisting of a three-story brick building and lot having dimensions of approximately one hundred (100) by one hundred and twenty-five (125), for the sum of thirty-six thousand ($36,000.00) dollars, payable as follows:

"By the said party of the second part conveying unto the said party of the first part the property situated at and commonly known as numbers 165, 167 and 169 Benton street, in the said city of Detroit, county of Wayne and State of Michigan, consisting of one brick building and two frame houses and lot having dimensions of approximately fifty-seven (57) feet by ninety-five (95) feet subject to an existing mortgage on same of four thousand ($4,000) dollars.

"The said party of the first part hereby agrees to accept the conveyance of the said Benton street property upon the basis of the valuation of twenty thou-

sand ($20,000.00) dollars, giving the said party of the second part credit for the sum of sixteen thousand ($16,000.00) dollars, at which time the said party of the first part will execute and deliver unto the said party of the second part a warranty deed to said Fort and Hubbard property, free and clear of and from all liens and encumbrances, excepting a certain mortgage thereon in the sum of twenty thousand ($20,000.00) dollars, which mortgage has about five (5) years to run, without any intermediate payments to be made on the principal of said mortgage, until due. Said mortgage bearing interest at 6% per annum, which interest is to be paid semi-annually.

"And it is agreed that upon the delivery to said second party of the warranty deed above mentioned, the said second party will assume the said mortgage and agree to pay the same. Upon the execution and delivery of said warranty deed the said party of the second part agrees to execute and deliver unto the said party of the first part a warranty deed to the said Benton street property, subject to said mortgage of four thousand ($4,000.00) dollars which mortgage the said party of the first part agrees to assume and pay.

"The respective parties hereto are to furnish Burton or Union Trust abstract of title, certified to date forthwith, showing the said properties to be free and clear of and from all liens and encumbrances whatsoever, excepting as aforesaid. The deal to be closed and said warranty deeds to be executed and delivered within one (1) week after the said abstracts of title are delivered by the respective parties hereto.

"Possession of the respective premises to be delivered at the time the said deal is closed.

"In witness whereof, the parties hereto have nereunto set their hands and seals at the city of Detroit, this day and year first above written.

"JULIUS BERMAN, (L. S.)
"H. B. HAMBURGER." (L. S.)

Defendant gave notice under the plea of the general issue that he would prove that his signature to said contract was secured through fraud and misrepresentation on the part of the plaintiff. It appears that the so-called Fort street property which defendant negotiated to exchange with plaintiff for the Ben-

ton street property belonged in fact to a corporation known as the Suburban Land Company, one-third of the stock of which belonged to defendant, one-third to one Marshall and one-third to one Dwyer, at the time of its incorporation. At the time of the trial there were two or three other stockholders. The legal title to the Fort street property stood in the name of Elon J. Dwyer, though it was conceded upon all sides that it belonged to the corporation. The same evening, after the contract in suit was executed, defendant met Marshall, who with himself and Dwyer controlled the corporation owning the Fort street property, and was advised by Marshall that the plaintiff had overreached him in the deal and that he, Marshall, would not consent to going forward with the trade. Dwyer took the same attitude. Defendant had lived in the neighborhood of the Benton street property for many years and was acquainted with it. He made a more particular examination of it on the morning after the execution of the contract and claims to have then discovered that plaintiff had misrepresented certain facts in connection therewith to him. He, however, did not at that time notify plaintiff that he had been induced to enter into the contract by fraud, and would for that reason refuse to consummate it, neither did he notify him that his associates and co-owners, Marshall and Dwyer, refused to consummate the deal. On the contrary, he permitted plaintiff to have his abstract of title brought down to date and went with plaintiff to his attorney where deeds were prepared effecting the exchange. Defendant was unable, however, to persuade his associates to execute a deed of the Fort street property, and then set out to effect a sale of the Benton street property to other parties. He entered into a written contract on the 4th of September for the sale of the Benton street property for the sum of $18,500. This deal finally fell through because de-

fendant Berman was not satisfied with the contracts the purchaser was to turn over to him for his equity in the Benton street property. In the following weeks he made further efforts to sell the Benton street property and did not finally repudiate his obligations under the contract in suit until September 25, 1915. Evidence was offered on behalf of both plaintiff and defendant touching the value of the equity in each of the properties, the subject of the exchange, and a verdict was directed by the court in favor of the plaintiff, the jury being instructed that the only question open for their determination was the amount of damages suffered by the plaintiff. The court held that defendant, Berman, by dealing with the Benton street property and offering it for sale after he had discovered the alleged fraudulent representations made to him by plaintiff, must be held to have affirmed the contract and that the defense of fraud was not open to him. The jury rendered a verdict in favor of the plaintiff for $2,500.

BROOKE, J. (*after stating the facts*). We are of opinion that the court was correct in holding that defendant by his dealings with the Benton street property, after his discovery of the alleged fraudulent representations, precluded himself from interposing the defense of fraud, his conduct amounting to an affirmance of the contract. *Foster* v. *Rowley*, 110 Mich. 63, and cases cited. All of defendant's requests were addressed to the question of alleged fraudulent representations made by plaintiff and to the question of plaintiff's good faith in entering into the contract. No request on behalf of the defendant was preferred upon the question of the measure of damages. Upon that point the court instructed the jury as follows:

"So, gentlemen of the jury, it then comes down to a question of the value of the property. It is for you to determine, therefore, what damages the plaintiff has sustained, if any, by reason of the entering into

of this contract. To ascertain and determine that you are to use your judgment from the evidence in the case, the evidence that has been introduced upon the trial of the case as to the value of the respective pieces of property. In determining this, it is your duty to determine it by a preponderance of the evidence; that is, by the weight of the evidence. As to both the value of the Fort street property and of the Benton street property. After having ascertained and determined by a preponderance of the evidence the value of each piece of property, you are then to deduct from the value, for instance, on the Fort street property, the amount of the mortgage on that property, and from the Benton street property the amount of the mortgage that is on that property, and the difference would be the amount of the damages which plaintiff claims to have sustained in this case. You are to arrive at the damages in that manner."

Error is assigned upon this portion of the charge, it being the contention of the defendant that under the contract the transaction amounted to a sale at a fixed price and that the plaintiff, by bringing suit on the contract, thereby ratified and affirmed all of its terms and provisions including the valuation of $20,000 (subject to a mortgage of $4,000) which he himself placed upon the Benton street property. Under this argument it is contended that:

"Plaintiff cannot now recover substantial damages for the fancied goodness of his bargain by repudiating the very material and binding contract provision as to the agreed value of his equity ($16,000.00), by claiming a substantial diminution thereof within a few days after the execution of this agreement."

It is further urged on behalf of the defendant that the question of good or bad faith of defendant should have been submitted, citing *Hammond* v. *Hannin*, 21 Mich. 374, and *Way* v. *Root*, 174 Mich. 418.

We are of opinion that the contract in essence amounts to an agreement for the exchange of two properties. The values fixed by the respective parties upon the properties were mere estimates and were so

fixed merely for the purpose of effecting an exchange. Defendant's evidence upon the question leaves no doubt that this is what was in the minds of the parties at the time the contract was made. We are further of opinion that the situation of the defendant is not like that considered in *Hammond* v. *Hannin, supra,* but rather is governed by the case of *Dikeman* v. *Arnold,* 78 Mich. 455. The rule as stated in 2 Sutherland on Damages (4th Ed.), page 1988, is as follows:

"If the person selling is in default—if he knew or should have known that he could not comply with his undertaking; if he, being an agent, contracted in his own name, depending on his principal to fulfill his contract merely because he had power to negotiate a sale; if he has only a contract of the owner to convey, or a bond for a deed; if his contract to sell requires the signature of his wife to bar an inchoate right of dower, or the consent of a third person to render his deed effectual; if he makes his contract without title in the expectation of subsequently being able to acquire it and is unable to fulfill by reason of causes so known, as the want of concurrence of other persons, or if he has title and refuses to convey, or disables himself from doing so by conveyance to another person—in all such cases he is beyond the reach of the principles of *Flureau* v. *Thornhill,* 2 W. Bl. 1078, and is liable to full compensatory damages, including those for the loss of the bargain."

In the case at bar the defendant, when he entered into the contract in suit, knew that the legal title to the Fort street property stood in the name of Dwyer and that the property was actually owned by a corporation in which he was a minority stockholder. Nevertheless, by the execution of the contract, he undertook to convey the same. The true measure of plaintiff's damages was the amount lost through the failure of defendant to carry out his contract, said loss to be ascertained as of the date of the breach. It is urged on behalf of the defendant that nowhere in the charge of the court are the jury instructed to determine the

values of the several properties as of the date of the breach. As before stated, however, no request upon that point was preferred on behalf of the defendant and it clearly appears from an examination of the record that all of the witnesses examined as to value, testified to values at or near the time of the breach. We do not think the jury could have been misled by the charge of the court or that the case should be reversed because more specific instructions were not given.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

VEREEKE v. CITY OF GRAND RAPIDS.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — INJURED EMPLOYEE—ELECTION OF REMEDIES.

   Under section 15, part 3, of the workmen's compensation act (2 Comp. Laws 1915, § 5468), an injured employee must make an election, and he cannot proceed against his employer for compensation and also against a third party, the wrongdoer, for damages.[1]

2. SAME—RIGHT OF ACTION AGAINST WRONGDOER CONFERRED UPON EMPLOYER.

   Under the same section, when an employer pays compensation he is empowered to recover such sums as he pays from the wrongdoer for his own benefit.

3. SAME—RELEASE OF EMPLOYER FROM ACTION AT LAW—WRONGDOER NOT RELEASED FROM ACTION BY ADMINISTRATOR.

   But the only limitation under said act upon the right of a dependent who accepts compensation from an employer is to release said employer from all claims or demands at law, if any, arising from such injury; and it cannot be contended that a dependent, by accepting compensa-

[1]See note in L. R. A. 1916A, 72.

tion from an employer, thereby releases the wrongdoer from liability in an action for the benefit of heirs at law or creditors of a deceased employee.

4. SAME—DEPENDENT'S AWARD NOT AFFECTED BY ADMINISTRATOR'S SUIT.

Where a city employee was accidentally killed, and the mother made a claim and was awarded compensation as a dependent under the workmen's compensation act, thereby clothing the city with a right of action against the wrongdoer, and the city failed to prosecute its right of action under section 15, part 3, of said act, it could not, by petition to the industrial accident board, have credited upon the award against it any sums received by the mother as a result of a suit brought by the administrator of the deceased son's estate against the wrongdoer.

Certiorari to Industrial Accident Board. Submitted June 13, 1918. (Docket No. 44.) Decided September 27, 1918.

Kate Vereeke presented her claim for compensation against the city of Grand Rapids for the accidental death of her son in defendant's employ. On petition of defendant to discontinue payments under an award. From an order denying the petition, defendant brings certiorari. Affirmed.

Ganson Taggart, City Attorney, and *Charles A. Watt*, Deputy City Attorney, for appellant.

John J. McKenna, for appellee.

Certiorari to the industrial accident board. On October 1, 1913, David Vereeke was killed while in the employ of the city of Grand Rapids. On the 5th day of March, 1914, his mother, claimant herein, entered into a stipulation with the city touching the amount earned by her son and the amount contributed to her. Based upon this stipulation the industrial accident board awarded claimant the sum of $6 a week for a

period of 300 weeks. She removed the case to this court for review where it was affirmed. *Vereeke* v. *City of Grand Rapids*, 184 Mich. 474. In the meantime a petition had been filed in the probate court by Cornelius Vereeke, father of David, asking for the appointment of himself as the administrator of his son's estate. Such appointment was opposed by Kate Vereeke, claimant herein, and as a result one Frank D. McKay was appointed as such administrator. Said McKay entered into a written contract with the attorneys of Cornelius Vereeke and with the attorneys of Kate Vereeke by the terms of which they were to bring a suit at law against the Grand Rapids-Muskegon Power Co. under the survival act for the purpose of recovering damages on account of the alleged negligent killing of David Vereeke. By said contract it was provided that 50 per cent. of any recovery should be paid to the attorneys representing the administrator, one-half to the attorneys of Kate. This suit proceeded until October 5, 1915, when it was adjusted with the consent of the judge of probate for the sum of $2,050, which was on that date paid by the Grand Rapids-Muskegon Power Co. to the administrator. Of this sum the administrator paid to the attorneys as per his contract the sum of $1,000. Various other disbursements, including his own compensation, reduced the balance to $963.95. Both Cornelius and Kate laid claim to this sum. The probate court made an order assigning one-half to Cornelius and one-half to Kate. This order was affirmed in the circuit court on appeal and Kate Vereeke, claimant herein, received as her share thereof the sum of $481.92. While the matter was pending in the circuit court on appeal the city of Grand Rapids filed a petition in the circuit court for leave to intervene, but later failed to prosecute its claim to said fund or any part thereof. After the same had been paid to the claimant, Kate, the city

of Grand Rapids filed a petition with the industrial accident board in which it prayed that it be authorized to cease payment to the said Kate Vereeke as in said order required and further that the city be allowed a credit on the amount awarded to said Kate Vereeke on the order heretofore made to the amount of one-half of said sum of $2,050 paid by the Grand Rapids-Muskegon Power Co. to Vereeke's administrator as aforesaid and by him paid to Kate Vereeke. This petition was answered by the claimant herein and a hearing had thereon before the industrial accident board. It was there made to appear that the city had paid to Kate Vereeke on the order of the board the sum of $1,230 and further facts substantially as above set forth were brought out. The board denied relief under the petition and its determination is now reviewed in this proceeding.

BROOKE, J. (*after stating the facts*). Section 15 of part 3 of the workmen's compensation law (2 Comp. Laws 1915, § 5468) provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

Section 1 of part 6 of said law (2 Comp. Laws 1915, § 5488) reads as follows:

"If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment

from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."

Under these two sections it is the claim of defendant city that the industrial accident board was in error in permitting claimant to retain the sum received by her in settlement of the suit at law against the Grand Rapids-Muskegon Power Co. and at the same time compel it, the defendant city, to continue payments to claimant as compensation under the act. This it is said amounts to double compensation to the claimant and should not be permitted. It is true that under section 15 of part 3 above quoted, the employee himself must make an election and cannot proceed against his employer for compensation and against a third party, the wrongdoer, for damages, and it is equally true that when the employer pays compensation he is empowered under the same section to recover such sums as he pays from the wrongdoer for his own benefit. Neither the section under consideration, however, nor section 1 of part 6 (2 Comp. Laws 1915, § 5488) contains any limitation upon the rights of dependents except that, under section 1 of part 6, a dependent who accepts compensation from an employer releases to said employer all claims or demands at law, if any, arising from such injury. We think it cannot be contended that Kate Vereeke, by accepting compensation from the city of Grand Rapids, thereby released the Grand Rapids-Muskegon Power Co., the alleged wrongdoer, from liability in an action for the benefit of heirs at law or creditors of David Vereeke. By making a claim for compensation against the employer, the defendant city, she clothed that employer

under the terms of section 15, part 3 (2 Comp. Laws 1915, § 5468), with a right of action against the wrongdoer. Had that right of action been prosecuted by the city recovery thereupon would certainly have been taken into consideration in awarding damages in a suit instituted by the administrator of the estate against the alleged wrongdoer. Having failed to protect its rights in the manner pointed out by the statute we are of opinion that the appellant city cannot now by petition to the industrial accident board have credited upon the award against it any sums received by Kate Vereeke as a result of the suit against the power company.

Judgment must be affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

NORRIS *v.* HOME CITY LODGE NO. 536, INDEPENDENT ORDER OF ODD FELLOWS.

1. FRAUD—VENDOR AND PURCHASER—OPTIONS—PRICE.
   It was fraud for the holder of an option on real property to represent to prospective purchasers that he was the agent of the owner, and that the lowest cash price the owner would accept for the land was $15,000, when in fact he was not the agent of the owner, and the option fixed the price at $11,000.

2. SAME—DAMAGES—INJURY.
   In order to furnish ground for judicial action, fraud and injury must concur.

3. TRIAL—DEFENSES—INCONSISTENT DEFENSES—VARIANCE.
It was error for the court below to submit to the jury two inconsistent and contrary defenses, one of which was neither alleged in the pleadings nor supported by the evidence.

4. FRAUD—ISSUES—VALUE OF LAND—DAMAGES.
Where the defense to an action on a promissory note given as part of the purchase price of a piece of land was that plaintiff had fraudulently misrepresented to defendants the price which the owner was willing to take for the land, the question of the value of the land was immaterial.

5. SAME—TRIAL—INSTRUCTIONS—FAILURE TO CALL WITNESSES.
Where the theory of the defense was that two of the defendants, who had also signed the note, had conspired with plaintiff to deceive and mislead the other defendants, an instruction that plaintiff's failure to call the two defendants to the witness stand might be regarded by the jury as a badge of fraud unless explained, was error.

6. BILLS AND NOTES—LIABILITY—TRIAL.
Where a note sued upon was not signed by corporate defendants, an instruction by the court that they could not be held liable was correct.

Error to Jackson; Parkinson, J. Submitted June 6, 1918. (Docket No. 48.) Decided September 27, 1918.

Assumpsit by Michael D. Norris against Home City Lodge No. 536, Independent Order of Odd Fellows, and others, on a promissory note. Judgment for defendants. Plaintiff brings error. Reversed.

Price & Whiting, for appellant.

B. E. Brower (*W. S. Cobb*, of counsel), for appellees.

In this case plaintiff sought to recover $2,000 and interest upon the following note:

"$2,000. JACKSON, MICH., May 17, 1912.
"Ninety days from date, for value received we promise to pay Michael D. Norris or bearer, the sum

of two thousand dollars, with interest at six per cent. per annum, payable annually after August 17, 1912.

"TEMPLE COMMITTEE HOME CITY LODGE
I. O. O. F. No. 536.
"A. L. FELLOWS, Pres.
"JAS. GILMORE, Sec.
"FRED C. LOGEMAN, V. P.
"E. W. DUNFEE,
"WARREN O. NEWTON,
"ERNEST T. HARPER,
"M. S. LUTZ."

Two of the signers of the note, Fellows and Logeman, failed to appear and were defaulted. A plea of the general issue was interposed by the other defendants under which they gave notice that they would show that the note in question was given as a part of the purchase price of a certain piece of real estate in the city of Jackson upon which was to be erected an Odd Fellows temple; that they were induced to execute said note by false and fraudulent representations on the part of the plaintiff. These representations consisted in plaintiff asserting:

1. That he was the agent of the Fred Miller Brewing Co., the owner of the property.
2. That the lowest cash price said brewing company would accept for said property was $15,000.

They aver that both said representations were false; that the Fred Miller Brewing Company had fixed a price of $11,000, and that plaintiff had an option thereon for a period of 60 days at said sum, then unexpired, and that he himself wrongfully and fraudulently fixed the price of $15,000; that to accomplish said sale plaintiff entered into a fraudulent conspiracy with defendants Fellows and Logeman, who were members of temple association and Home City Lodge No. 536, and through them induced defendants to believe the alleged false and fraudulent representations aforesaid.

On May 13, 1912, the Fred Miller Brewing Co.

deeded the property in question to plaintiff, Norris, the consideration named being $11,000. On May 17, 1912, plaintiff deeded the same property to one Chas. H. Ruhl, and on the same date said Ruhl sold the same upon land contract to the Home City Lodge No. 536, the consideration named being $8,000. It is apparent that the defendant lodge paid the plaintiff Norris $7,000 of the purchase price at the time of the execution of the contract. In this sum was included the $2,000 note in suit. At no time after the discovery of the alleged fraudulent representations made by plaintiff did defendants, or either of them, tender back to plaintiff, Norris, the property in question. The corporate defendant purchasing the property has paid approximately one-half of the purchase price and continues in possession. Under the plea of the general issue there was no notice of recoupment. The case was submitted to a jury under a very exhaustive charge and the jury returned a verdict of no cause of action.

BROOKE, J. (*after stating the facts*). A careful perusal of this record convinces us that there was an abundance of evidence tending to show that plaintiff represented to the purchasing committee, who afterwards signed the note in question, that he was acting in the transaction as the agent of the brewing company, indeed, he executed the following receipt:

"$100.00. April 20, 1912.

"Received from Alva Fellows for I. O. O. F. 536, One Hundred Dollars, as payment on Miller Brewing Co. property, balance to be paid on or before May 10th, 1912.

"Purchase price $15,000.

"M. D. NORRIS, Agent.
"For Fred Miller Brewing Co."

—in which he so described himself. There is further evidence to the effect that he represented that the sum of $15,000 was the lowest cash price which

the brewing company would accept for the property. It is clear upon the face of the record that both of these representations, if made, were false.

It is the primary contention of plaintiff in this court that the defendants were not entitled, under the pleadings and proof, to have their alleged defenses of fraud and misrepresentation submitted to the jury and that a verdict should have been directed in his favor. This contention is based upon the theory that defendants could not interpose their defenses of fraud unless they could show that the fraudulent representations resorted to by plaintiff induced them to act to their injury; in other words, that defendants upon discovery of the alleged fraud should have rescinded, and having neither rescinded nor shown upon the trial that the property was in fact worth less than the $15,000 paid therefor they are not entitled to interpose the defenses of fraud in this action upon the note. It is asserted that fraud and injury must concur in order to furnish ground for judicial action, citing Elliott on Contracts, §§ 71-91. The soundness of this legal principle is not questioned, but its applicability to this case is denied, under the following authorities: *Barnard* v. *Colwell*, 39 Mich. 215; *Hidey* v. *Swan*, 111 Mich. 161; *Holvanson* v. *Oatman*, 165 Mich. 512 (35 L. R. A. [N. S.] 423); *McGough* v. *Hopkins*, 172 Mich. 580. The controlling facts of these several cases are so nearly like the facts in the case at bar, as found by the jury, as to render them indistinguishable upon principle.

Error is assigned upon the following excerpt from the charge of the court:

"It was the duty of Fellows and Logeman, and each of them, as members of the committee appointed for the purpose of purchasing a site for a temple, to act in good faith toward the lodge and other members of the committee, and to aid in purchasing the property in question at the lowest possible price, and if you

believe from the testimony and from the circumstances and facts shown in evidence that Fellows and Logeman, or either of them, had any understanding or agreement with the plaintiff whereby they or either of them was to conceal from the other members of the committee the fact that plaintiff had an option on the property, or that he was to profit to the extent of $4,000 or any other sum by the sale thereof, or that they, said Fellows and Logeman, or either of them, would, by suggestion, argument, persuasion or other means, influence the other members of the committee or the lodge in the purchase of this property, or that they would by any other means whatever aid or assist in bringing about this sale and purchase without disclosing such knowledge, but should suppress it, then I instruct you that plaintiff in this case cannot recover and your verdict must be for the defendants.

"These defendants also claim that even if the charge of conspiracy is not sustained to your satisfaction that plaintiff Norris was himself guilty of such fraud, fraudulent statements or assent to false and fraudulent statements made in his presence and in aid of furtherance of his purposes and expressly or impliedly assented to by him as sustains the charge of fraudulent conduct on his part whereby these defendants are relieved from their contract as makers of this note.

"Among these it is claimed by the defendants that Norris concealed from them the fact he was acting for himself in bargaining for the sale of the property, and also falsely represented to them that he was acting as agent of the Fred Miller Brewing Company in making the sale; that he falsely represented $15,000 was the lowest cash price of that company for the property; that on the contrary he was acting, at least in part, for himself; that $15,000 was not the price of that company but was the price fixed by himself and $4,000 in excess of the company's price; that he thereby forestalled any inquiry by defendants as to his real connection with the deal, or misled them or put them off the track of inquiring as to his personal interest in it, or the real price that the company was willing to take, and that defendants were thereby led

to believe and did believe the property belonged to such brewing company, and so believing they dealt in relation to it as wholly belonging to that company without knowledge of the claimed rights or interests of Norris, and being deceived so assented to its acquisition by the lodge and so made the note in question, not knowing they were paying but $11,000 to the brewing company and $4,000 to Norris, and which they claim had they known these facts they would not have done, but that they were wholly deceived and defrauded. * * *

"If Fellows and Logeman were not deceived by Norris and were not wrongfully and intentionally cooperating with him or conspiring with him, as it has been termed, and were not, or either of them, making any false statements or representations by Norris' procurement or connivance, then Norris is not responsible for what they or either of them said or did to help on the deal, unless there were misstatements calculated to mislead or deceive made by one or the other or both of them in his presence and hearing and not corrected by him. * * *

"But, if there was a design on his part or on the part of Fellows, or Fellows, Logeman, and Norris, acting in concert, not to let the others know for fear it might defeat or interfere with the deal, or affect the price to be paid, or for any other reason of personal advantage to Norris or to Norris and these two men or either of them, and for these reasons they did not communicate their knowledge to the other members of the committee or Norris did not communicate it, then such concealment would be unlawful and fraudulent.

"But, if Norris did mislead Fellows, or Fellows and Logeman, and they in turn, even though innocently, misled their associates or the temple association, believing what Norris had told them, and in consequence of their being so misled the deal was consummated under such misapprehension and in consequence of it, and Norris knew of it, but remained silent, he would be responsible for that and that would be fraud. * * *

"Did Norris in this transaction, acting alone or wrongfully aided by Fellows or Logeman or both, act and talk in carrying on the negotiations so as to lead

the defendants to believe, intending they should believe, and so they did in consequence believe, that $15,000 must be paid to the Fred Miller Brewing Company for this property in question, and pursuant to that belief created in their minds by Norris, intentionally, did they assent to the acquisition of the temple property and as part of the consideration execute this note sued upon in consequence of this belief and the further representation that it was to pay Norris for advancing a like amount of $2,000 to the brewing company to complete payment of the purchase price of $15,000, and were they deceived and misled by this? If so, plaintiff cannot recover and your verdict must be no cause for action. * * *

"To what extent and in what respects, if any at all, Norris, or Fellows and Logeman, if wrongfully conspiring with Norris, made false statements and the extent of the deception, if any, are for you to determine, and the effect or result of these false statements on the minds and consequent action of these five defendants, if any such were made, whether they were deceived to their injury or not, is all for your determination."

The criticism as to this portion of the charge is that it submitted to the jury two inconsistent and contrary defenses, one of which was absolutely unsupported by evidence. It is pointed out that neither in the pleadings nor the proofs did defendants attempt to show that Fellows and Logeman were themselves deceived by plaintiff, but it is asserted that the averments of the notice under the plea, and the evidence introduced tend to support the conclusion that plaintiff conspired with Fellows and Logeman to deceive the other members of the purchasing committee. We are of opinion that the charge upon this point is justly open to criticism. *Way* v. *Root*, 174 Mich. 418, and *Remer* v. *Goul*, 185 Mich. 371.

The court further charged the jury that:

"It would make no difference if defendants believed the property they acquired was actually worth $15,000, or that it was in fact worth $15,000. It is as

regards this case wholly immaterial if the property was actually worth $15,000."

Error is assigned upon this portion of the charge. Under the authorities first above cited we think the question of the value of the property is immaterial to the issue. The court further charged:

"Neither Fellows nor Logeman has been produced here to testify. They reside in this city, are business men, are accused by defendants as being concerned with Norris in perpetrating the fraud charged. Under such circumstances you have the right to consider this and assume that if they had been produced and sworn they could not or would not have been of assistance to plaintiff. And as no reason has been shown for not producing them, they being familiar with the transaction as well as interested parties and being within reach of the process of the court, you have the right to regard this as a badge of fraud, unless such failure to produce them is explained."

We think this instruction erroneous. We have been cited to no authorities justifying it. Fellows and Logeman were two of the makers of the note in suit and were named as defendants. The fact that they had been charged by their fellow defendants with having joined the plaintiff in a fraudulent conspiracy does not in our opinion warrant the instruction that plaintiff's failure to call them to the witness stand might be regarded as a badge of fraud.

Error is assigned upon the instruction of the court that the corporate defendants could not be held liable. We think this instruction correct. The note in suit was not signed by either corporate defendant. Error is assigned upon rulings of the court touching the admission or exclusion of testimony. We find no reversible error therein.

For the reasons stated the judgment must be reversed, with costs, and a new trial ordered.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

GRAND RAPIDS & INDIANA RAILWAY CO. *v.* ALLEGAN CIRCUIT JUDGE.

1. CERTIORARI—ADDITIONAL WRITS—JURISDICTION—DISCRETION.
   In the exercise of a sound discretion, the circuit judge should have directed the issuance of additional writs of certiorari directed to the probate judge and the special commissioners before whom certain drain proceedings were heard, to return the records and proceedings therein, where, in their return to the writ of certiorari removing said proceedings to the circuit court for review, the county drain commissioners, against whom the writ was directed, returned that they were unable to say as to the correctness of attached copies of said proceedings, and that the only persons who might return the same or answer as to the correctness would be the judge of said probate court and such special commissioners.

2. SAME—LIMITATION OF ACTIONS—NEW PARTIES.
   Where plaintiff acted seasonably and within the ten days limited by the statute (section 4908, 1 Comp. Laws 1915), to secure a review in the circuit court of the proceedings, additional writs should issue as a matter of course, even after the expiration of the time limited by the statute; section 12364, 3 Comp. Laws 1915, providing that new parties may be added at any stage of the cause, as the ends of justice may require.

Mandamus by the Grand Rapids & Indiana Railway Company to compel Orien S. Cross, circuit judge of Allegan county, to vacate an order denying a motion for additional writs of certiorari in certain drain proceedings. Submitted June 18, 1918. (Calendar No. 28,149.) Writ granted September 27, 1918.

James H. Campbell (*Elvert M. Davis*, of counsel), for plaintiff.

Charles Thew, for defendant.

This is an application for mandamus to compel the

vacation of an order of the circuit judge denying a motion to issue additional writs of certiorari to review proceedings for cleaning out, deepening, and extending the Bisbee drain. The record discloses that on May 24, 1917, the drain commissioners of Allegan county and Kent county made a final order of determination in connection with the cleaning out, deepening, and extending of said Bisbee drain. Prior to said date and on April 18, 1917, three special commissioners appointed by the probate court made a return in writing that a public necessity existed for the cleaning out, deepening, and extending of said drain; that it was necessary to take the property of the railway company described in the petition for such purpose and awarding the railway company the sum of $600 as compensation. On June 2, 1917, and within ten days from the date of the filing of the final order of determination the railway company served notice upon the drain commissioners that it intended to remove said proceeding to the circuit court for the county of Allegan by writ of certiorari for the purpose of review and on the same day presented to a circuit court commissioner for Allegan county an affidavit for writ of certiorari accompanied by the statutory bond. The writ was allowed on the same day, June 2, 1917, by said circuit court commissioner, attested in the name of the circuit judge for Allegan county; directed to and served upon the drain commissioner for Allegan county and the drain commissioner for Kent county. By said writ said officials were commanded to certify to the circuit court the records and proceedings in connection with said drain proceeding. The writ recites that the affidavit for the writ has attached to it certified copies of the testimony taken before the probate court and before the special commissioners. The drain commissioners are therefore excused from making service of a copy of such testimony. To this writ

the drain commissioners of the two counties concerned made full returns. Referring to the testimony taken before the judge of probate and before the special commissioners, the return of the drain commissioners is to the effect that they cannot say as to the correctness of such certified copies, and aver that the only parties who might return the same or answer to the correctness of the same would be the judge of said probate court and such special commissioners. Thereupon an application was made by the railway company on June 13, 1917, for additional writs of certiorari to be directed to the judge of probate and the special commissioners appointed by the probate court commanding them to make a return of all proceedings had before said court or said special commissioners in relation to said drain. This motion was denied by the learned circuit judge on August 2, 1917, but in denying said application the following order was made:

"It is further ordered that the said respondents be required to make further answer to said writ of certiorari as to the testimony given by them in probate court and before the special drain commissioners, and to answer as to whether or not the testimony set forth in the affidavit for the writ of certiorari is the testimony as given by them before the judge of probate and before said special drain commissioners."

To the order to show cause issued in this case the learned circuit judge who heard it returns in part as follows:

"The following points were discussed and considered:

"*First.* Whether the drain commissioners could be compelled to make further return as to the matters which they did not do in their official capacity and as to the proceedings in the probate court and before the special commissioners.

"*Second.* Whether two new and separate certioraris should be ordered issued by said court,"

And further:

"That as to paragraph 17 this respondent says, that he admits the matters therein set forth, but alleges in addition thereto that the order presented to the commissioner for a certiorari was drafted by the counsel for petitioner, to suit his demands on said application, and that said commissioner did not refuse to grant him the certiorari that he asked for.

"That as to paragraph 27 this respondent admits that the affidavit for certiorari was filed; that the return was made and that the exhibits attached are substantially correct; that he has no knowledge whether the evidence taken by the stenographer is true and gave a full account of all the evidence received but insists that what such evidence is should be returned by the probate court and special commissioners before whom the same was taken, and that the drain commissioners cannot be required to state whether said evidence is full and correct.

"And in further answer to said paragraph this respondent insists, that a large portion thereof is argumentative and that in so far as it quotes the answer of said drain commissioners to the affidavit for certiorari, that said answer, being an exhibit, should be taken as a whole and so construed and that the reason why said drain commissioners did not in such answer reply to all the matters set up in the affidavit for certiorari, that the matters which they did not reply to were such that either the probate court or special commissioners should have replied to, being matters before them in their official capacity and not matters which said drain commissioners could answer or return upon."

BROOKE, J. (*after stating the facts*). It is the contention of counsel for defendant that the circuit court was without power to grant the additional writs of certiorari. This position is predicated upon the fact that the statute, 1 Comp. Laws 1915, § 4908, provides that notice of such certiorari shall be served upon the county drain commissioners within ten days after the final order of determination has been filed. It

appears to be conceded that the railway company proceeded strictly in accordance with the terms of the statute to secure a review in the circuit court, but the return of the drain commissioners shows that they are unable to make return of the proceedings before the probate court as well as those before the special commissioners. The argument is made that, because this application for additional writs was made after the expiration of the ten days limited by the statute, the circuit court is without jurisdiction to issue the additional writs. The railway company filed no new affidavit and alleged no additional errors. It is asserted on behalf of the company that returns should be secured from both the probate court and the special commissioners in order that the circuit court may be possessed of all matters and proceedings to enable it to intelligently pass upon the alleged errors. It is, of course, true that one desiring to review drain proceedings by certiorari is limited strictly by the statute, but in the case at bar it appears to us that the petitioner acted seasonably and that if the drain commissioners are unable to make return of all proceedings affecting the establishment of the drain and bearing upon the rights of the petitioner, that additional writs should issue as a matter of course even after the expiration of the ten days limited by the statute. That the drain commissioners are unable to make a full and complete return is apparent both by their return to the writ issued against them and from the return of the learned circuit judge to the order to show cause herein. Section 13, chapter 12, of the judicature act (3 Comp. Laws 1915, § 12364) provides:

"No action at law or in equity shall be defeated by the non-joinder or mis-joinder of parties. New parties may be added and parties mis-joined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require."

In certiorari it has been held that in the discretion of the court, others standing in the same relation as the original relators to the proceedings sought to be reviewed may be admitted to occupy the same position, although the time limited for suing out the writ has expired. *People, ex rel. West,* v. *City of Syracuse,* 59 N. Y. Supp. 763, and where it is necessary to add new parties before the hearing to aid the court to render a decision the same may be done. *Bowlby* v. *Mayor, etc., of Dover,* 64 N. J. Law, 184 (44 Atl. 844).

The court below must hear this case under the writ of certiorari already issued. We can see no reason, when such hearing is had, why the court in reaching its determination should not be aided by whatever may be made to appear through the returns made by the probate judge and the special commissioners. We have no hesitation in holding that the jurisdiction of the circuit court to issue writs was not exhausted by the issuance of the first writ against the drain commissioners and that in the exercise of sound discretion he should have directed the issuance of additional writs directed to the parties against whom the same were sought. Mandamus will issue.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

DETROIT TAXICAB & TRANSFER CO. *v.* WAYNE CIRCUIT JUDGE.

DEFAULT—COURT RULES—SETTING ASIDE DEFAULT.

The provisions of Circuit Court Rule No. 32, section 4, providing that where the plaintiff has taken the default of the defendant, the default should not be set aside after the expiration of six months, does not apply where the default of the plaintiff is taken by the defendant; in which case the question of setting aside the default addresses itself to the sound discretion of the court.

Mandamus by the Detroit Taxicab & Transfer Company to compel George S. Hosmer, circuit judge of Wayne county, to vacate an order setting aside a default. Submitted July 2, 1918. (Calendar No. 28,381.) Writ denied September 27, 1918.

A. J. Groesbeck, for plaintiff.

Walter M. Nelson, for defendant.

PER CURIAM. Mandamus is sought to set aside an order made by the respondent. The petitioner was served with a summons on the 15th day of March, 1915, at the suit of one Thomas A. Noble. Defendant entered its appearance in said cause by its attorney on the 23d of March, 1915. Nothing further was done in said action until the 14th day of April, 1916, and on that day the default of plaintiff for failure to file his declaration was regularly filed in said cause. Subsequently an order was made by the Wayne circuit court dismissing the cause, under the provisions of section 2, chap. 18, of the judicature act (3 Comp. Laws 1915, § 12574). Nothing further was done in said cause until the 19th day of March, 1918, when the attorney for the plaintiff filed a motion to set aside the order dismissing the case, and asked that

the same be reinstated, the principal reason alleged being that he believed that a declaration had been filed, and on the 30th of March, 1918, an order was entered setting aside the order defaulting the plaintiff in the action. Since then a declaration has been filed and tendered the defendant, in which the plaintiff claims damages for personal injuries sustained while employed by the relator.

It is the contention of counsel for the relator that the circuit judge clearly abused any discretion vested in him in setting aside the default taken April 14, 1916, on a motion made March 19, 1918. Our attention is called to section 4 of Circuit Court Rule No. 32, which provides for setting aside defaults taken against the defendant by the plaintiff. The section in question reads as follows:

"Any order entered under this rule may be set aside on special motion for cause shown, in the discretion of the court, on such terms as may be deemed just and proper. In actions at law, the party desiring to have a default set aside shall, as soon as practicable after he shall know or have reason to believe that the default has been filed, file and serve an affidavit of merits, and make application to the court to have the default set aside. In actions in equity, to entitle a defendant to an order setting aside his default for want of appearance or answer, he shall proffer a sworn answer showing a defense on the merits as to the whole or a part of the plaintiff's case. In all cases where personal service shall have been made upon a defendant, and proceedings taken after default on the strength thereof, his default shall not be set aside unless the application shall be made within six months after such default is regularly filed. And, subject to statutory provisions, in any case where personal service shall have been made upon a defendant, an order setting aside his default shall be conditioned upon his payment to the plaintiff of the taxable costs incurred in reliance on said default, and the court may impose such other conditions as shall be deemed proper."

It is said that this rule establishes the policy of the State in fixing a time beyond which defaults should not be set aside, and that while in terms it is limited to cases where the plaintiff has taken the default of the defendant, the rule should be extended by construction to include cases where the default of the plaintiff is taken by the defendant. With this contention we cannot agree, as the language of the rule is explicit and plain and the six months' provision made to apply only to cases where the default of the defendant has been taken. The various sections of Rule No. 32 cover the question of defaults of either party, and nothing is found within the rule to prevent the respondent from acting. It simply becomes a question of whether or not, under the circumstances of this case, it should be said that he abused his discretion in setting aside the default. The setting aside of a default under circumstances similar to the one here in question, addresses itself to the sound discretion of the court. No claim is here made that anything has happened since the order dismissing the case which has prejudiced the relator in its defense, and we find nothing in the record to justify us in saying that the learned trial judge clearly abused the discretion vested in him.

The writ is denied, with costs.

AMERICAN INSURANCE CO. OF NEWARK *v.* MARTINEK.

1. APPEAL AND ERROR—FINDINGS OF FACT—REVIEW—STATUTES.
   Under section 15, chap. 18, of the judicature act (3 Comp. Laws 1915, § 12587), errors based upon exceptions that findings of fact are against the weight of the evidence are reviewable by the Supreme Court.

2. INSURANCE—PRINCIPAL AND AGENT—CANCELLATION OF POLICY—DUTY OF AGENT—LIABILITY.
   When instructed so to do, it is the duty of an insurance agent to cancel a policy of insurance issued by him, and if he fails to cancel he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow his instructions.[1]

3. SAME—NOTICE—CONTRIBUTORY NEGLIGENCE.
   In an action by an insurance company against its agent for a loss occasioned by the neglect or refusal of the agent to cancel a policy after repeated instructions to do so, where letters in evidence from plaintiff to defendant showed that plaintiff assumed that the policy had been canceled and that the agent had merely neglected to return it to plaintiff as instructed to do, and the agent did not inform plaintiff to the contrary, a finding by the court below that plaintiff by its general officers knew that the policy was not canceled and that it should be held guilty of contributory negligence for not canceling direct, *held*, not warranted by the evidence.

4. SAME—RETENTION OF PREMIUM—ESTOPPEL.
   Where it appeared from defendant's testimony that he retained the entire premiums collected on plaintiff's policies for 2½ months, and that all he had to do was to pay the return premium out of plaintiff's funds, give himself credit for that amount, charge it to the company, and deduct it from his next statement, and return the policy in lieu of the cash, there is no merit in defendant's claim that plaintiff retained the premium and was thereby estopped from maintaining the suit.

Error to Menominee; Flannigan, J. Submitted

[1]See notes in 22 L. R. A. (N. S.) 509; L. R. A. 1915A, 860.

June 7, 1918. (Docket No. 70.) Decided September 27, 1918. Rehearing denied January 31, 1919.

Case by the American Insurance Company of Newark, N. J., against Jacob J. Martinek for failure to cancel a policy of insurance. Judgment for defendant. Plaintiff brings error. Reversed.

Sawyer & Sawyer (*Thomas Bates*, of counsel), for appellant.

Doyle & Barstow, for appellee.

KUHN, J. In this action it is sought to recover damages occasioned to the plaintiff because of the failure of the defendant, as plaintiff's agent, to obey its instructions and cancel a certain fire insurance policy written by the defendant in the plaintiff corporation. The case was tried before the judge without a jury, who at the close of the testimony filed written findings of fact and of his conclusions of law and entered judgment in favor of the defendant. The case is brought here by the plaintiff to review the conclusions of law of the learned trial judge and the findings of fact by him made.

In order that the case may be fairly understood, it is necessary to set forth certain facts. The plaintiff has been lawfully engaged in carrying on the business of fire insurance in this State, prior to, on, and ever since October 21, 1910, and the defendant conducted a general fire insurance agency at Menominee in this State, where he represents some 35 insurance companies, including, during the period of this controversy, the plaintiff in this case. The appointment of the defendant as agent contained the following:

"To receive proposals for insurance against loss and damage by fire, * * * to fix rates of premiums, and receive moneys for transmission to the company,

and to countersign, issue and renew policies of insurance signed by the president and secretary of the company, subject to the rules and regulations of the company, and such instructions as may from time to time be given by its officers and managers."

The appointment was not for any specified time, but the right was reserved in the company to revoke the appointment at any time. Five years before the appointment of the defendant to the agency for the plaintiff, the defendant's predecessor in said agency issued a policy of insurance in said company, insuring one Jule Duquaine against loss or damage by fire, covering a certain elevator building, the machinery and appliances therein, and other contents thereof, located at Carney in said county, in the sum of $3,400. This policy had been renewed from year to year and was in force when said defendant received and accepted said agency for the plaintiff. The defendant thereafter annually renewed the said policy until April 17, 1916. On the 8th of April, 1916, the defendant filled out and delivered to said insured a policy of insurance insuring said property in like amount from April 17, 1916, to April 17, 1917, and on the same day reported the transaction to the plaintiff, which report was received by the plaintiff on April 10, 1916. On April 11th, and again on April 27th and on May 9, 1916, the plaintiff wrote to the defendant, disapproving the policy unless revised to cover not exceeding $1,500 on the building and equipment, with stock item to equal or exceed that amount. The defendant did not reply to any of these letters, and on May 24, 1916, the plaintiff wrote the defendant:

"Assuming from the delay that the assured is not willing to increase the grain insurance and cut down the building item, we must ask for the return of the canceled policy."

On the 9th and 17th days of June, 1916, the plain-

tiff, by the use of a blank form mailed to defendant, had said, among other things, with reference to this policy:

"As the policy has doubtless been taken up, please return it to this office at once. We wish to state that we never give an agent credit for the return premium on canceled policies until they are received at this office. * * *

"Trusting we will be favored with the above mentioned policy at once, we remain."

On July 3, 1916, a duly authorized special agent of plaintiff wrote to the defendant requesting attention at once and the cancellation and return of the policy, and on July 7th, 10th, and 28th a form letter, containing in substance what we have quoted above from the other form letter, was mailed to, and duly thereafter received by, the defendant. The defendant in no way replied to any of plaintiff's letters or notices regarding the policy, although he had written a great many policies in the plaintiff company and had canceled the policies when he had been requested so to do. The insured property was damaged by fire on July 31, 1916, entailing a loss as established by the proofs and adjustment, which the plaintiff was obliged to and did pay, on the 16th day of September, 1916, in the sum of $2,801.88, besides the expense of adjustment, amounting to $49.72. It is for these two amounts that this action is brought, with interest thereon from the date of payment.

Counsel for plaintiff and appellant in their brief, with reference to the rule of law applicable, said as follows:

"When instructed so to do, it is the duty of an insurance agent to cancel a policy of insurance issued by him, and if he fails to cancel, he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow his instructions."

In reply, counsel for defendant say, referring to this statement of the law:

"So far as the above statement of law goes, it is unchallenged. There is no doubt that the above quotation is a correct statement of a rule of the law of agency. The difficulty with opposing counsel is that they stop short with this one rule of agency and disregard entirely other and equally binding, well-settled rules of this same law of agency. One need not look into a law book to know that unless a principal had some redress against his agent for disobedience of instructions, there would be few relations of principal and agent established."

But it is insisted that, notwithstanding the acknowledged negligence on the part of the defendant, no right of recovery should be had in this case, because it is urged that the doctrine of contributory negligence on the part of the plaintiff should be invoked, and that if this is done, under the findings of fact of the court, the defendant should not be held liable. In the findings of fact the following is found:

"The facts and circumstances of the case justify the inference which is drawn, that the plaintiff's general officers knew the defendant had not rearranged the insurance or canceled the policy, and in ample time to have prevented a loss by cancellation direct."

The seventh assignment of error is as follows:

"The court erred in finding, and in refusing to strike therefrom, as per plaintiff's fifth proposed amendment, as follows: 'But the question remains whether he (referring to defendant) could be held for the loss where it appears the plaintiff knew of his disobedience in ample time to have avoided loss by cancellation of policy itself,' because the same, and the assumption of facts referred to is against the clear weight of the evidence."

It, therefore, becomes necessary for us, by virtue of section 15, chap. 18, of the judicature act (3 Comp. Laws 1915, § 12587), to review this finding of fact.

We cannot agree with the learned trial judge that, under the circumstances of this case, the plaintiff should be held guilty of contributory negligence or that the doctrine of avoidable consequences can be made to apply. The record showed that the defendant had, under the instructions of plaintiff, prior to this time canceled a great many policies, and he clearly understood it to be his duty, when instructed to do so by the plaintiff, and it seems to us that the plaintiff had the right to believe, and that the record justifies the conclusion that it did believe, that its instructions as to the cancellation of this policy were being obeyed, for in the notice sent by the plaintiff as late as the 28th of July, there appeared the following:

"We again call your attention to the fact that we have not as yet received policy No. 11173, issued to Jule Duquaine and ordered canceled ———— 1916, at your agency. As the policy has doubtless been taken up, please return it to this office at once."

The defendant did not answer a single one of the letters that he received, but refused to obey the instructions of the plaintiff as to canceling the policy. The agent was located hundreds of miles from the principal, and the only method by which the plaintiff could ascertain whether the policy had been canceled was through its agent, who refused to advise it whether he had canceled it or not, but instead of doing so, he stubbornly refused and neglected to perform his duty under his appointment as the agent of the plaintiff. We are of the opinion that there is nothing in the record to warrant the inference that the plaintiff knew that the policy was not canceled, but in our opinion the conclusion is clearly warranted that they supposed that their positive instructions as to cancellation of the policy had been complied with and that the plaintiff had been refusing to return the canceled policy. A somewhat similar case is found in 169 Pac. 213

(a Kansas case), *St. Paul Fire & Marine Ins. Co.* v. *Bigger*, 102 Kan. 53. Another instructive case is *London Assurance Corporation* v. *Russell*, 1 Pa. Super. Ct. Rep. 320, where the court said:

"In the defendant's testimony, the plaintiff company is relieved entirely of any charge of contributing to this loss, as the letters produced by the defendant clearly show that the company relied on their first notice through their representative, Mr. Calley. The primary obligations of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions in all cases to which they ought properly to apply. He is, in general, bound to obey the orders of his principal exactly, if they be imperative, and not discretionary; and, in order to make it the duty of a factor to obey the order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order. * * * One who receives orders to cancel a policy delays their execution at his peril."

It is also said by counsel for defendant that as the company retained the premium, that fact operated as an estoppel against the plaintiff. We do not think there is any merit in this contention, for the defendant testified:

"At the end of the month I make a current statement and send it to the company. In 45 days or 50 days thereafter, they draw on me through the bank. If I had canceled this Duquaine policy, I would have had to pay Mr. Duquaine back his unearned premium, then I would charge that to the company, and in my balances I get credit for it."

It appeared that the defendant at all times had in his possession the entire premiums collected on plaintiff's policies for two and one-half months, and all he had to do was to pay the return premium out of plaintiff's funds, give himself credit for that amount, charge it to the company, and deduct it from his next

statement, and return the policy in lieu of the cash. With him it was simply a matter of bookkeeping.

After a careful review of this record, we are satisfied that the trial judge erred in rendering a judgment for the defendant, and a judgment upon these facts should have been entered for the plaintiff for the full amount claimed. The judgment is, therefore, reversed and a new trial granted, with costs to the appellant.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

EVERHART v. CLUTE.

1. LIBEL AND SLANDER—PRIVILEGE—MALICE.
   A slanderous statement is not privileged, although made in response to a direct question by a third party, where there was proof of actual malice in that defendant circulated stories to the same effect as the slanderous statement both before and after the date of the alleged slander, and that he also made the same slanderous statements to persons who had no interest in the subject-matter.

2. SAME—TRIAL—INSTRUCTIONS—DAMAGES.
   An instruction by the court below that the jury, in estimating the amount of plaintiff's damages, might take into account any damage suffered by him by reason of the repetition or circulation of the slanderous words which was directly caused by defendant's publication thereof in the first instance, although not supported by the record, was not prejudicial, where the verdict was not excessive.

3. SAME—MALICE—NEW TRIAL—EXCESSIVE VERDICT.
   Where it was plaintiff's theory that, ever since litigation

between them many years before, defendant had repeatedly circulated and published these slanderous statements about plaintiff, and had even pursued him and carried them into a new neighborhood to which he had removed, the court below was not in error in refusing a new trial on the ground that the verdict for $1,000 was excessive.

4. TRIAL—INSTRUCTIONS—ISSUES PRESENTED.

Held, that the issue presented by the parties was fairly submitted to the jury with proper instructions.

Error to Cass; Des Voignes, J. Submitted June 19, 1918. (Docket No. 72.) Decided September 27, 1918.

Case by Charles E. Everhart against John Clute for slander. Judgment for plaintiff. Defendant brings error. Affirmed.

Clarence M. Lyle and *Gore & Harvey*, for appellant.

Elias P. Harmon and *Asa K. Hayden*, for appellee.

KUHN, J. The following statement of facts is taken from the opinion of the learned trial judge denying the motion for a new trial:

"The case was based upon the alleged slanderous actionable words uttered by defendant of and concerning the plaintiff. The plaintiff for many years was a farmer, a resident of Newburg township, Cass county, but for the past year or two is one of the deputy State game wardens with residence at Three Rivers. The defendant has resided many years in Newburg township, following the occupation of farming. Both parties were for many years neighbors in that township.

"During the period they were neighbors, they became involved in litigation over the ownership of some turkeys. Both raised turkeys and defendant replevined some turkeys of plaintiff which he alleged were his. The case went through the several courts and the final determination of the issue is reported in [*Clute* v. *Everhart*] 137 Michigan, at page 5. The litigation engendered bad feeling and seems to have continued notwithstanding the lapse of many years.

"It is the claim of plaintiff that during the time that has intervened defendant lost no opportunity to slander him among the neighbors and even to strangers; that later and after he had been appointed to the office he now holds, defendant on the streets at Colon, Michigan, and to people at Mt. Gilead and elsewhere said of and concerning the plaintiff, when asked the question: 'Did you (defendant meaning) ever hear of this man, Everett, stealing any turkeys?' in reply defendant is claimed to have said, 'Yes, God damn him, I am the man he stole the turkeys of, and I have the documents to prove it.'

"Defendant denied making the statement on the trial, but did testify on the trial that he told the persons making the inquiry the facts of the replevin case of the turkeys and then added, 'You can draw your own conclusions,' or words to that effect."

The trial resulted in a verdict for the plaintiff in the sum of $1,000, and the case is brought to this court by writ of error by the defendant.

It is the first contention of defendant's counsel that the slander, under the circumstances alleged by the declaration and testified to by the plaintiff's witnesses, must be held to be confidential and privileged, as the answer of the defendant was made in response to a direct question put to him by one Homer Eberhard. It is therefore said that the court erred in overruling the objection of defendant's counsel made at the beginning of the trial to the reception of any testimony. Counsel for appellant do not say whether the answer should be held to be absolutely privileged or only qualifiedly privileged, but an answer to their contention, it seems to us, is clearly found in the contention of plaintiff, which was sustained by proof in the case, that there was actual malice on the part of the defendant, which is shown by proof that the defendant had previously, and also subsequently to the date when the alleged slanderous statement was made, circulated stories to the same effect as the slanderous statement.

It also appears that the alleged false and slanderous statement was made to persons who had no interest in the subject-matter. See *Flynn* v. *Boglarsky*, 164 Mich. 513 (32 L. R. A. [N. S.] 740), in which opinion authorities in this State on this question are cited.

The court in his charge to the jury instructed them in part as follows:

"If you find that the plaintiff has suffered any damage not necessarily confined to the publication of the words charged by defendant himself, but that there was a repetition or circulation of the slanderous words which was directly caused by defendant's publication thereof in the first instance, if any, that may be taken into account in estimating the amount of plaintiff's damage. And if you find from all the facts and circumstances in the case that defendant uttered the words claimed by plaintiff, and that the same became current in the community, or among any number of persons in the community, then the damage which plaintiff may have suffered, if any, by reason thereof, may be taken into account by you in arriving at the measure of his damage, if any. And this element of the case would bear only upon the amount of damage to plaintiff's reputation and feeling and humiliation in the community where he lived."

It is not contended that this was an incorrect statement of the law, but that there was no basis whatever in the record to support it. We have been unable to find, and our attention has not been challenged by counsel for appellee to any direct testimony of the repetition of the slanderous words caused by the defendant's publication and circulation thereof in the first instance. We are, however, of the opinion that this statement in the charge cannot be said to have been prejudicial, in view of the fact that, in our opinion, the amount of the judgment cannot be said to be excessive. It was the theory of the plaintiff, as has been stated, that the defendant, since the trial of the first litigation, which found its way to this court, and

which apparently precipitated all the trouble, has repeatedly circulated and published these slanderous statements about the plaintiff, and even after he left his old neighborhood, pursued him and carried them into the new home which he made for himself, where he had received the appointment as a deputy State game and fish warden. *Leonard* v. *Pope*, 27 Mich. 145 (note). We cannot say that a verdict of $1,000 for injury to the feelings of the plaintiff under such circumstances is one so clearly excessive that the trial judge should have granted a motion for a new trial on that ground.

It is also claimed that the charge of the court is argumentative, but a careful reading of it is satisfying that this criticism is without merit and that the issue presented by the parties in the trial was fairly submitted to the jury with instructions which properly safeguarded the rights of the defendant.

We find no prejudicial error, and therefore affirm the judgment.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

LOUD LUMBER CO. *v.* STERLING CEDAR & LUMBER CO.

CANCELLATION OF INSTRUMENTS — CONTRACTS — FRAUD — TIMBER LAND — RESCISSION — BURDEN OF PROOF.

On appeal from a decree of the court below rescinding a contract for the sale of a tract of timber land on the ground of fraud in misrepresenting the amount of timber thereon, evidence examined, and *held*, that the parties

were dealing with each other at arm's length, acting on their own independent investigations, and that plaintiff has failed to meet the burden of proof resting upon it as to the allegations of fraud and misrepresentation.

Appeal from Mackinac; Shepherd, J. Submitted June 18, 1918. (Docket No. 32.) Decided September 27, 1918.

Bill by the Loud Lumber Company against the Sterling Cedar & Lumber Company and others for the rescission of a contract on the ground of fraud and for an accounting. From a decree for plaintiff, defendants appeal. Reversed, and bill dismissed.

Lucking, Helfman, Lucking & Hanlon (*Victor D. Sprague*, of counsel), for plaintiff.

Willis Baldwin (*Henry Hoffman* and *Angell, Bodman & Turner*, of counsel), for defendants.

KUHN, J. This is a bill for rescission of a contract for the purchase of certain timber lands, on the ground of fraudulent misrepresentations by the vendor as to the quantity of timber thereon. The vendor was the defendant Sterling Cedar & Lumber Company and the land in question was a tract of 3,560 acres in Mackinac and Chippewa counties which the company had purchased in 1906, after an examination by its cruiser, Mr. John C. Scott, whose report showed 19,380,000 feet of merchantable saw-log timber thereon. The purchase price, according to plaintiff's claim, was $55,820; according to defendants', nearer $80,000. On this tract, at the village of Charles, the company owned and operated a saw mill and shingle and tie mill. In 1909, it requested the Security Trust Company of Detroit to act as trustee under a bond mortgage proposed to be placed on this property. The trust company employed Mr. George F. Beardsley, of

Grand Rapids, to estimate the amount of timber on the land. He appears to have been an experienced estimator whom the trust company was accustomed to depend upon in large transactions of this kind. Beardsley's report showed 27,760,000 feet of merchantable timber and a later report of his added over 1,000,000 feet of balsam, bringing the total up to 29,340,000 feet. In 1910, Scott made a second cruise for the Sterling Company, at which time he reported 27,530,000 feet of timber. On May 1, 1911, the Sterling Company executed a serial bond mortgage to the Security Trust Company in the aggregate sum of $135,000, covering the entire tract and securing the payment of its bonds maturing in series annually from May 1, 1912, to May 1, 1920. These bonds were not sold to the public, but most of them were held as collateral by certain bank creditors of the Sterling Company. In August, 1912, the Sterling Company, being quite heavily in debt, inserted the following advertisement in the American Lumberman:

"FOR SALE—SAW MILL WITH TIMBER.

"An up-to-date going plant with 30M capacity circular mill; also shingle and tie mill, docks, store, dwellings, and camps, all going full force, with six thousand acres virgin hard and soft timber, cedar and pulpwood. Cut hardwood this winter, now cutting soft wood, especially located for water shipment in Michigan on Lake Huron. Entire cut can be contracted at good prices. Can arrange a bond issue; prefer retaining an interest, more timber in vicinity can be added; shingle timber for twenty years cut."

This advertisement attracted the attention of Mr. H. Kimball Loud, who was connected with the lumber business of H. N. Loud & Sons at Au Sable and Oscoda, and to his letter of inquiry Mr. W. C. Sterling, Sr., replied:

"We are running full blast, have not cut a tree on my land for five years, preferring to buy from others

and save my timber. Prefer to retain an interest with right party with experience.

"One hundred and sixty thousand will secure all but quick assets with many years good business and control of the Carp river timber. * * *

"The property can be bonded for $135,000.00."

In the course of the negotiations which followed, it was represented by the defendants Sterling, according to plaintiff's claim, that there was close to 30,000,000 feet of saw-log timber on the property. The written Beardsley statement of the amount of timber, etc., on the land was delivered to Mr. Loud, but not the original estimate made by Mr. Scott. It appears to have been the understanding and desire of both parties that Mr. Loud should have an independent cruise of the land made to check up the Beardsley estimate. Mr. Loud wrote several times for the detailed estimate by forties, but all that was furnished him was Scott's 1910 estimate on 9 forties, the Sterlings claiming that the other detailed reports had been lost or mislaid. Mr. Loud's father was interested to some extent in the project, and in January, 1913, the Louds employed Mr. George Wilson to cruise the land for them. While Wilson was up there the first time, Mr. Scott, the Sterlings' estimator, who was acquainted with Wilson, came up to the tract and gave him what purported to be a summary by sections of his 1906 cruise, but which really contained the figures of his 1910 cruise, showing a total of 27,530,000 feet. This fact was unknown to the Louds until the trial of this case. In February of the same year Wilson went back to cruise the lands by forties, at which time he covered 33 out of the 89 forties and also went over some of the remainder roughly to get a general idea of it. He did not complete it at that time on account of the extreme cold weather. While he was up there, the Sterlings and the Louds and their attorneys were hav-

ing conferences and negotiations in Detroit and Monroe, which resulted, on February 15, 1913, in the signing of a contract providing for the sale of the tract to H. Kimball Loud for $160,000, the Louds to organize a corporation, to issue their own mortgage bonds for $160,000 and to give the Sterlings $50,000 of preferred stock and $122,000 in bonds. The Sterlings were to buy the remaining $38,000 of bonds for $34,000 cash to provide a working capital, the contract to be void if they failed to do so in 14 days. The Louds had the right to withdraw from the contract if the report of Wilson's cruise was unfavorable or if they could not raise the necessary money. At this time the Louds did not have Wilson's report, but had a telegram from him relating to 26 forties, and soon after received his report on the 33 forties together with some general statements as to the remainder. On February 19th, however, Mr. H. K. Loud wrote W. C. Sterling, Sr., that they had been unable to secure the money for a working capital and withdrew from the contract unless the Sterlings themselves could bond the property for $160,000. The Sterlings immediately took up the matter, and a meeting was arranged in Detroit for February 27th, at which Mr. Sterling reported that he could sell the bonds if the Louds would guarantee them, and offered to loan $17,000 for a working capital. The Louds wanted time to have the cruising completed, but the Sterlings insisted that haste was necessary. On March 1, 1913, the contract now sought to be rescinded was made and executed by the parties. It bears date February 28, 1913. It provides for the purchase of the timber tract for $160,000 and of the camp equipment and store for $7,000, to be paid for in the following manner: The Loud Lumber Company was to be organized with $100,000 common and $50,000 preferred stock, to be fully paid for by the property

purchased under the contract. The Loud Lumber Company was to assume $119,000 of the outstanding bonds of the Sterling Cedar & Lumber Company, which the Sterlings were to take and dispose of at 90c on the dollar; it was to turn over to the Sterling Company the $50,000 preferred stock, and to give its note for the balance of the $160,000, viz., $2,900, and for the further sum of $7,100 which the Sterling Company was to loan in cash for a working capital; also to give its note for $7,000 for the camp equipment. This arrangement was carried out, and the Sterling Company sold the $119,000 of bonds for $112,000. In order to facilitate the sale of these bonds, a few days after the contract was made Mr. Sterling wrote Mr. H. K. Loud:

"Wish you would write me some sort of a letter for our bond men advising: 'You bought the property on George F. Beardsley's estimate after having two of your own cruisers go over the standing timber, verifying the estimates of Beardsley and those the Sterling Cedar & Lumber Co. had, and satisfying yourself that the timber was there.' If you wish to elaborate a little, you can say, as your report sent us shows, that the cedar poles overrun about 16,700; pulpwood 750 cords, ties 100,000, posts 300,000, etc. Also comment on what cruisers say about chances of fire, conditions of roads in woods, Carp river for operating and driving, mills and docks, also value of land timber is on, and location of property as to freight rates and markets, etc."

The Louds accordingly wrote the brokers, McLaughlin, Rice & Davis, substantially along the lines requested. The Loud Lumber Company was organized in March, 1913, and commenced operations on the property, among other things building a five-mile railroad to the southeast corner of the property. From time to time the Loud Lumber Company employed Wilson to cruise particular forties as an aid to plaintiff in its lumbering operations. It was not until

March, 1915, that Wilson had sufficient information to make a complete report by forties, and his final report at that date indicated that there were but 15,744,000 feet of timber on the tract at the time of the purchase. In the fall of 1915, plaintiff employed Thomas Burrell to cruise the lands, whose report showed 5,558,000 feet of saw-log timber then on the tract. According to plaintiff's records, it had cut 5,891,366 feet, which would seem to indicate that there were but 11,449,366 feet on the land when purchased by plaintiff. Prior to the hearing, plaintiff also employed William T. Tubbs and C. H. Fultz to examine the timber, who made detailed reports by forties, and their combined reports showed 4,254,000 feet of saw timber still on the land, which, if plaintiff's cutting records are correct, would mean that there were only 10,145,366 feet of saw timber on the land at the time of plaintiff's purchase. After Burrell's report, plaintiff ceased to cut timber, and in October, 1915, filed the bill of complaint in this cause. After a full hearing, the learned trial judge made the following findings:

"Reflection has confirmed my opinion formed at the conclusion of the taking of the testimony and on the arguments, that the Louds, in making the purchase, relied largely and substantially upon the representation of the officers of the defendant company that there was more than twenty-nine million feet of merchantable timber standing upon the lands purchased, and that no timber had been cut by the Sterlings since their purchase and estimated by the witness Scott.

"I find as a matter of fact that there was on the land at the time of its purchase by the Louds less than one-half the timber represented; and that while it was owned by them the Sterlings had done some lumbering on the land.

"The first of these misrepresentations, that is, as to the amount of standing timber, of itself constitutes such a fraud upon the plaintiff as confers upon it a right to relief in equity. The plaintiff is the child of

the contract and may sue upon it. It is not barred by laches, delay or otherwise."

The decree provided that the deed and contract be set aside; that $47,500 of preferred stock and $7,000 bonds held by the Sterlings, and also the $2,900 and $7,000 notes, be canceled; that the Louds be held harmless for the $2,500 of preferred stock sold and on $90,000 of bonds outstanding; that an accounting be had, in which plaintiff shall be allowed all payments made on the railroad, one-half its expenditures on the mill, and all payments for permanent improvements; that the Loud account books be held final in the accounting for timber; and that the defendants William C. Sterling, Sr., and William C. Sterling, Jr., be held personally liable. It further dissolved some pending attachment suits and enjoined all actions at law.

Counsel for plaintiff, in their brief, state their claims as follows:

"1. That a deliberate, wilful fraud was perpetrated upon the Louds and the plaintiff who succeeded to their rights, by the defendants, who falsely represented to them that the Mackinac tract contained over 29,000,000 feet of merchantable saw-log timber plus certain forest products, that the Beardsley cruise was correct and the timber and forest products therein set forth was on the lands, that Scott's cruise of nine forties was all the defendants had left of his total cruise and was a fair average of the eighty-nine forties, that Beardsley's cruise and Scott's cruise roughly checked with each other, that the defendants had not cut timber or forest products on the lands since September, 1907, *i. e.*, for five years prior to September, 1912, and not since the date of the Beardsley 1909 cruise. And that the concealment of the Scott 1906 cruise of 19,000,000 feet and of the Sterling cutting since that date to 1913 was wilfully fraudulent, even if based on legal advice of defendant's attorney as claimed.

"2. That defendants fraudulently hurried the Louds and plaintiff into the transaction on the fraudulent

pretext that speed was necessary to secure a sale for the bonds and that the excuse therefor offered by defendants in their answer 'that negotiations for the sale of the bonds had progressed so far that expedition was advisable to assure a probable bond sale,' and the defense offered on the hearing that a delivery of the Scott 1906 cruise and checking thereof would have taken time and would have caused the Louds to 'continue their investigation for a longer period of time' is merely a fraudulent afterthought.

"3. That in cases of wilful and deliberate fraud, as distinguished from constructive fraud, laches is not a meritorious defense and will not be favorably regarded, and that equity will permit a rescission after some of the sold property has been consumed, allowing the fraudulent vendor consideration therefor and adjusting the equities between the parties."

After a careful study of the transaction which forms the basis of this litigation, we are unable to agree with the conclusion reached by the learned trial judge, and are convinced that the plaintiff has failed to make out a case entitling it to the relief prayed for. The circumstances on which its counsel place their chief reliance, while they might, if properly linked with other facts, have considerable weight as evidence of fraudulent dealing, in the absence of such supporting evidence can be as easily accounted for on the theory that the defendants were acting in perfect good faith in the matter. Plaintiff has by no means met the burden of proof resting upon it to establish fraud. We are impressed that the Louds were dealing at arm's length in the transaction, were taking nothing for granted, but intended to satisfy themselves, and did satisfy themselves, by an independent investigation that the amount of timber represented by the defendants was actually on the land. Indeed the record seems to indicate that the Sterlings were anxious to have them get a complete, independent estimate and were confident that it would verify the Beardsley

report. Such an estimate would be an added advantage in putting through the bond deal, which was a necessary part of the transaction. We find no evidence that Wilson was hindered or misled in any way in making his cruise or that he was not acting in good faith and for the interests of his employer. In the absence of such proof, we attach no significance to the fact that Scott was up on the tract at the time Wilson was cruising and went into the timber with him. The complaint made by the plaintiff that the Sterlings led the estimator into the best timbered portion of the tract and withheld from him the detailed reports covering the poorly timbered sections has little weight as evidence of fraud in view of the attitude of the Louds as disclosed by the very letters in which they asked for the detailed reports. On December 13, 1912, Mr. Loud wrote:

"If you have the detailed estimates, would you please let me use them? We could then plan to go where the timber is heaviest and not lose time on unimportant parts,"

And again:

"Can the detailed estimates be obtained from the Security Trust Company? * * * Without them considerable time would be wasted in going over descriptions on which there was not much timber to see."

Clearly their purpose in asking for the information was not to find where the poor timber was—their letters evince knowledge that there were poorly-timbered descriptions—but to enable them to spend most of their efforts in inspecting the well-timbered portions. The Sterlings claim that their purpose in withholding the information was to force the Louds to make a complete cruise of the entire tract. We do not see how the Louds can claim to have been deceived in this respect.

Again, we are unable to see any merit in plaintiff's contention that the Sterlings fraudulently hurried the closing of the deal before the Louds had completed their investigation. It appears that one contract had already been signed on February 15th, concerning which there is no claim of undue urging on the part of the Sterlings. By its terms it gave the Louds the chance to withdraw in case their cruiser's report did not show the amount of timber expected—in itself an evidence of good faith on the Sterlings' part—and the further opportunity to withdraw in case the Louds could not finance the deal. It was for the latter reason only that the Louds withdrew from that contract, and in announcing their failure they put it up to the Sterlings to see what they could do. Mr. H. K. Loud wrote:

"This is the last opening we know of as far as we are concerned for financing the enterprise, and apparently the only hope at present is in case you succeed in placing a bond issue of $160,000 upon the property. I sincerely hope that you may succeed in doing what we have been unable to do."

The Sterlings then took hold of the matter and did succeed in making arrangements with a firm of brokers to sell the existing bond issue upon a guaranty thereof by the Louds, and their urgency that the deal be promptly closed was that the results of their efforts in this behalf might not be lost through delay. Moreover, the Louds appeared so well satisfied with the information they already had from Wilson that they did not think it necessary to send him back to complete the cruising of the tract, and according to their own testimony, the only purpose for which they subsequently employed him from time to time to cruise particular descriptions was to aid them in their lumbering operations. The Louds explain their action in

entering into the contract as they did, without a complete report on the timber, and their subsequent failure to have Wilson promptly finish his cruise, by the alleged fact that at the conference at which the final contract was agreed upon, Mr. Sterling, Sr., guaranteed the correctness of the Beardsley estimate. Mr. H. K. Loud testified:

"All the talk I had with Mr. Sterling where he said he would guarantee the estimates, was in the room in the Pontchartrain. He said he would guarantee them there. I asked him, 'Will you guarantee those estimates?' He said, 'Yes.'"

Mr. H. N. Loud also stated that Mr. Sterling said he would guarantee the estimates, but the two Sterlings and Mr. Dixon, their attorney, denied that any such statement was made. No mention of any such guaranty is made in the written contract which was at once prepared. Both sides were represented by competent attorneys, the contract was drawn by the Loud's attorney, not by the Sterlings', it was carefully prepared, and there was every opportunity for the parties to safeguard all their rights. Indeed Mr. Sterling, Jr., testified that Mr. Helfman, while drawing the contract, asked particularly, "Is there anything about a guaranty to go into the contract?" and that both the Louds and Sterlings said, "No." This is disputed, but, however that may be, it is undisputed in the testimony, and in fact is admitted by Mr. H. N. Loud, that Mr. Helfman did inquire whether the contract contained the complete understanding of the parties, and that it was approved by both sides. We think the omission of any guaranty in the written contract is almost conclusive proof that no guaranty was in fact made or relied upon.

Another claim of plaintiff does not seem to us to be established by the evidence, viz., that the Sterlings had cut upwards of 5,000,000 feet of timber from the

tract since the Beardsley estimate was made. The most that can be said to have been shown is that a few men were cutting on the tract for about two weeks, and the testimony leaves it uncertain whether this cutting was before or after the Beardsley estimate. According to the best recollection of the witness, this cutting was done on section 14, and if this is true, the record shows that Mr. H. K. Loud had personal knowledge of it prior to the making of the contract. In describing his trip into the woods in January, 1913, he said:

"When we got out into section 14, going through the hardwoods, we came to a place where there was some cut—I noticed that. I said, 'Why here is some cut.' He (Scott) said, 'Yes, they cut—the Sterlings cut a little hardwood some years ago.' "

Complaint is also made that at the outset of the deal the Louds were furnished with Beardsley's report as representing the amount of timber on the tract, but the Scott cruise made in 1906 was withheld from them. We do not think it has been proven, however, that the Beardsley report was incorrect. The attempted proof of fraud in connection with his estimates we think has utterly failed. The fact that he was interested in an adjoining tract appears to have been in no way connected with his obtaining the employment. It was a mere accidental circumstance. The Sterlings had nothing to do with his selection, and it is difficult to see how they could have fraudulently manipulated his examination. Beardsley appears to have been a reliable man and his estimate to have been made in perfect good faith, and we are strongly impressed that it represented correctly the timber as he found it. We think the greater part of the discrepancy in the results of the various cruises can be accounted for by the fluctuations in the condition of the lumber market. Mr. H. K. Loud testified:

"When we bought, the conditions were quite favorable in the lumber business, but the prices dropped all right enough, and the demand, in some cases, went down to nothing. We didn't sell a tie in 1914. The ties stood on the dock—didn't a one move. The demand was fierce. * * *

"*Q.* Isn't it true, Mr. Loud, that when you purchased this in 1913—or at the present time now, there would be money in getting out a class of material that didn't pay you to get out in the summer of 1913 or 1914 or 1915?

"*A.* One could get out some material—low grade—when the prices are high, that you couldn't afford to do when they are low."

The estimates are of the *merchantable* saw-log timber on the tract. In a depressed condition of the market, a considerable quantity of timber would necessarily be classed as unmerchantable, because it could not be profitably cut and marketed, which would become merchantable upon a sufficient rise in the prices of lumber. Scott's original estimate was made for use as a basis of *purchase* by the Sterlings and was doubtless made as low as possible. Beardsley's figures appear to represent a fair estimate of the merchantable timber in a normal condition of the market. Scott's second estimate reached practically the same result. Wilson's estimate at the time of the Loud purchase overran Beardsley's in some respects. It is only in the amount of merchantable timber claimed to have been found on the descriptions covered by Wilson's later cruises, made during the period of depression in the lumber business, that the great deficiency appears. Moreover, his detailed report in 1915 happened to include a few descriptions already covered by his first cruise in 1913, and it is a significant fact that the figures as to these descriptions have been reduced substantially in his later estimate from those first reported. Plaintiff says in this connection that some timber had been cut in the meantime on these

descriptions, and that if this fact does not account for the entire discrepancy, it is proof that Wilson was tampered with in making his first estimate. But it might equally well be proof that his later estimate was made on a different basis than the former because of a change in market conditions, which excluded much of the timber from the class of merchantable.

As has been stated, we are satisfied that the plaintiff has not met the burden of proof resting upon it as to the allegations of fraud and misrepresentation, and are therefore constrained to reverse the decree of the court below, and a decree may be entered dismissing the plaintiff's bill of complaint, with costs to the appellant.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

GRAND RAPIDS & INDIANA RAILWAY CO. *v.* COBBS & MITCHELL.

1. CARRIERS — RAILROAD COMPANIES — STATE REGULATION — CONTRACTS — STATUTES.

The enactment of Act No. 300, Pub. Acts 1909 (2 Comp. Laws 1915, § 8109 *et seq.*), regulating common carriers and prohibiting unjust discrimination among shippers, rendered void a contract between a railway company and a lumber company whereby the railway company agreed to furnish cars for unlimited time free from demurrage charges, although said contract was lawful at the time it was entered into.

See note in 6 L. R. A. (N. S.) 834.

2. SAME—CONSTITUTIONAL LAW—POLICE POWER.

Said act cannot be said to impair the obligation of a contract within the constitutional inhibition, since it was entered into with the knowledge that the State, in the exercise of its police power, could pass laws regulating common carriers within its borders, and the hands of the State in the exercise of this power may not be tied by private contract.

3. SAME—DEMURRAGE—CONTRACTS—RECOUPMENT.

In an action for demurrage charges subsequent to the passage of the act, the railway company was entitled to recover, since the contract was void; and defendant could not recoup its damages for the breach of an unenforceable contract.

Error to Kent; Brown, J. Submitted June 6, 1918. (Docket No. 64.) Decided September 27, 1918.

Assumpsit by the Grand Rapids & Indiana Railway Company against Cobbs & Mitchell, incorporated, for demurrage charges. Judgment for plaintiff. Defendant brings error. Affirmed.

Norris, McPherson, Harrington & Waer, for appellant.

James H. Campbell, for appellee.

FELLOWS, J. Plaintiff, hereafter called the railroad company, operates a line of road from the Straits of Mackinac to Grand Rapids, and from there to Ft. Wayne, Indiana, passing through Cadillac and Boyne Falls in the State of Michigan. Defendant, hereafter called the lumber company, operates its mill at Cadillac and has extensive holdings of timber lands near Boyne Falls. Much of its timber lands had been acquired prior to the making of the contract hereafter referred to, and its holdings of timber lands in the vicinity of Boyne Falls have been considerably augmented since. Its investment in the business exceeds a million dollars.

The lumber company was transporting its logs from forest to mill over the line of the railroad company under an arrangement not appearing in the record, until October 1, 1899. On that date the parties entered into a contract for future transportation and services, the railroad company being named as the first party and the lumber company as the second party. The contract very fully sets up their agreement and contains among its many provisions the following:

"The second party agrees to furnish all the cars for the transportation of the logs as herein provided, such cars to be those theretofore used for like service by the second party. They shall be kept in proper repair by the second party.

"The first party reserves the right to use, instead of the logging cars in question, such a number of its standard flat cars as it can spare for the service; to the extent that such flat cars may be used the logging cars will be displaced.

"The second party shall be responsible for the first party's cars while off its line and in the second party's possession. In case they shall be injured, damaged or destroyed, the second party will make good the loss.

"The cars to be provided by the first party are to be rent free, and are to be deemed, while in the service herein contemplated, to be in the possession of the second party as near as may be."

On July 1, 1902, this contract was modified by the parties by a supplemental agreement containing only the following provision:

"Provision was made in the contract for the use of the standard flat cars of the first party, instead of the logging cars belonging to the second party. The second party now wishes the change to be made and the first party is willing that it should be done. The new service will begin at the date hereof.

"The rate for hauling the logs shall be one dollar per thousand feet and the cars shall be loaded with a minimum amount of four thousand feet each.

"The contract in question in all other respects shall continue as the arrangement between the parties in respect to the service in question."

Since the execution of this supplemental agreement the railroad company has furnished its cars for the conduct of the business and the performance of the contract. Pursuant to the provisions of Act No. 300 of the Public Acts of 1909 (2 Comp. Laws 1915, § 8109 *et seq.*) the railroad company filed with the railroad commission and published its tariffs, including its rules, regulations and charges for demurrage. Two days' free time for loading and unloading was given and $1 per day demurrage charge thereafter was fixed. No objection to this tariff by an interested party was made, nor any proceedings taken by the commission upon its own initiative.

The present action is brought to recover demurrage charges, some accruing at Boyne Falls and some at Cadillac. It was tried by the court without a jury and resulted in a judgment for plaintiff. There was some testimony that the cars were bunched; that is, that more cars were delivered to the lumber company than it could use or than its contract required, but this testimony was of so general a character that we would not be justified in disregarding the finding of the court that the cars were delivered to the lumber company pursuant to the terms of the agreement. The case seems to have been tried in the court below and submitted to this court upon the assumption that the clause of the original contract, as amended by the supplemental agreement providing for the free use of the cars, was valid when made. The case having been tried and submitted on that theory, we shall for the purposes of the case accept such assumption without deciding that question, and dispose of the case upon the record as made. The meritorious questions therefore presented to this court upon this record are:

(1) Does Act No. 300, Pub. Acts 1909, put an end to special contract rates for services performed by a railroad company, which special contract rates would result in unjust discrimination?

(2) If so, does it impair the obligation of contract within the constitutional inhibition?

That the portion of the contract making no limit upon the free time the lumber company might retain the plaintiff's cars was valid and enforceable at the time it was executed and until the legislature acted, is assumed by both parties. Nor can it be questioned that the contract would be unenforceable if now executed. Such a special contract giving to the lumber company free use of cars for unlimited time, when other shippers were required to pay $1 per day for all time over two days, would be unjustly discriminating in the highest degree. Therefore, the question for our solution is whether a provision of a contract valid when made, which would be invalid if now executed, comes within the purview of the act, and if so, whether the act itself squares with the Constitution.

It must be constantly borne in mind that we are dealing with a contract made with a public utility, a common carrier; that the movement was an intrastate movement; and that the State had the exclusive legislative prerogative over intrastate commerce, at least until congress should act, and that at this time congress had taken no steps looking towards Federal control of intrastate affairs.

We shall not attempt to cite the many acts passed by congress and the various States of the Union looking to the regulation of the railroads of the country. Suffice to say that congress acting within its sphere, regulating interstate carriers, and States acting within their sphere, regulating intrastate carriers, have passed many wholesome laws looking to the proper discharge by these public utilities of their duty to the

public and their regulation by the public they serve. Running through this legislation may be found the steadfast purpose of the legislative department to eradicate, root and branch, unjust discrimination for special shippers and the requirement of like charge and like service to all. This State, by a comprehensive act (Act No. 300, Pub. Acts 1909), kept pace with the other States of the Union. Prior to the bringing of this action various amendments to this act had been passed. See Act No. 139, Pub. Acts 1911; Act No. 173, Pub. Acts 1911; Act No. 370, Pub. Acts 1913; Act No. 389, Pub. Acts 1913.

By the provisions of the act in question, every common carrier was required, within 90 days, unless further time was granted by the commission, to file with the commission all schedules of rates (section 10*i*); such schedules are also to be kept open for public inspection and are required to contain, stated separately, "all terminal charges, storage charges, icing charges and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations" affecting the rates, and prohibits changes in such schedules of rates without giving ten days' notice; prohibits the carrier from engaging in its business unless such schedules are filed and published, and also prohibits the carrier from collecting any greater, less, or different compensation than therein specified (section 10). The amendment to this section by Act No. 139, Pub. Acts 1911, is unimportant here. By section 17 it is provided:

"It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unrea-

sonable disadvantage or prejudice in any respect whatsoever."

Express authority is given the commission to fix demurrage charges (section 8). The act provides severe penalties for its violation. It was passed under the police power of the State, and in the exercise of the sovereign power of the State to regulate public utilities.

The property of the carriers is charged with a public interest, their business subject to governmental control within the limits of the Constitution. That the cars of a carrier must be loaded and unloaded promptly and kept moving if it discharges its functions, its duty to the public, is self-evident. Experience has taught that a charge against a shipper for the retention of a car after a reasonable time to load or unload, a demurrage charge, puts the car back in use for transportation more promptly than any other known method. Demurrage charges are, and for some time have been, imposed by all railroads. They are recognized as legitimate charges, and, properly levied and collected, serve a useful purpose. A carrier may not work discrimination through demurrage charges any more than it may work discrimination through a charge for line haul. The law contemplates the eradication of unjust discrimination in every form, and discrimination may be as unjust and unfair to other shippers, to the public generally, when provided for in an existing contract as though indulged in without prearrangement. The legislature did not, by section 11 of the act or by any other section or provision, exempt from the operation of the act special existing contracts which were not common to all shippers for a like kind of traffic, and we cannot without judicial legislation write such exemption into the law.

Does the law as so construed impair the obligation of contracts within the constitutional inhibition?

When these parties entered into this contract they did so with the knowledge that the State, in the exercise of its police power, could pass laws regulating common carriers within its borders. Could these parties by private contract tie the hands of the State in the exercise of this power? Manifestly not. The language of Mr. Justice COOLEY, when a member of the interstate commerce commission and writing for that commission in the case of *Kentucky & Indiana Bridge Co.* v. *Railroad Co.*, 34 Am. & Eng. R. Cas. 630, is quite in point. He said:

"If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable."

Mr. Parsons, in his work on Contracts (vol. 2, p. 674), thus tersely states the rule:

"If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise."

In the case of *Atkinson* v. *Ritchie*, 10 East, 530, Lord Ellenborough said:

"That no contract can properly be carried into effect, which was originally made contrary to the provisions of law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law are propositions which admit of no doubt."

In the case of *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (20 Sup. Ct. 96), the court, in considering the power of congress to regulate commerce, and discussing the liberty of the citizen to make contracts, very clearly pointed out that if individuals or corporations could by enforceable contract regulate such commerce the power of congress

would be materially limited. The court said, speaking through Mr. Justice PECKHAM:

"The power of congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of congress, because the direct results of such contracts might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract.

"The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which from its general and great importance has been granted to congress as the proper representative of the nation at large. Regulation, to any substantial extent, of such a subject by any other power than that of congress, after congress has itself acted thereon, even though such regulation is effected by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the State itself."

The case of *Louisville, etc., R. Co.* v. *Mottley,* 219 U. S. 467 (31 Sup. Ct. 265, 34 L. R. A. [N. S.] 671), is quite in point. In 1871 Mottley and wife were seriously injured in a collision on the railroad of the plaintiff in error. An agreement was entered into between them and the company whereby their claim for damages was settled by an agreement of the company to issue to them free passes on its road during the remainder of their lives. This contract was performed by the railroad company until the enactment by congress of the so-called Hepburn bill, being the act of June 29, 1906 (34 U. S. Stat. 584), some of the provisions of which were engrafted into Act No. 300, Pub. Acts 1909. Mottley thereupon brought suit for the specific performance of the contract. The court fully considered the question and held that although

the contract was lawful and enforceable when made the subsequent enactment of the act of June 29, 1906, made its enforcement unlawful and denied the relief sought. See, also, *Fitzgerald & Co.* v. *Railroad Co.*, 63 Vt. 169 (22 Atl. 76, 13 L. R. A. 70); *Grand Trunk Western R. Co.* v. *Railroad Commission*, 221 U. S. 400 (31 Sup. Ct. 537); *Home Telephone Co.* v. *City of Los Angeles*, 211 U. S. 265 (29 Sup. Ct. 50). The recent case of *Traverse City* v. *Railroad Commission*, 202 Mich. 575, is upon principle quite analogous. In the *Mottley Case* it was said by the court:

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation render of no avail the exercise by congress, to the full extent authorized by the Constitution, of its power to regulate commerce."

What we have said not only disposes of the question of the plaintiff's right to recover but also defendant's claim that even though plaintiff may recover, it (defendant) may recoup its damages for the breach of the contract in failing to provide the use of its cars free and without demurrage charges. Obviously defendant cannot recoup its damages for the breach of an unenforceable contract.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

LAVIN v. LYNCH.

1. VENDOR AND PURCHASER—VENDOR'S LIEN—EQUITY.
   The vendor of real estate who takes no security for the payment of the purchase price has an equitable lien for such purchase money upon the lands so sold.

2. SAME—CONSIDERATION.
   Such liens exist independently of any express agreement, and courts of equity enforce them, on the principle that a person, having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it and not pay the consideration.

3. SAME—EQUITABLE TITLE.
   The lien attaches notwithstanding the fact that the sale did not convey a title in fee, or a legal title, but only an equitable right or interest.

4. ASSIGNMENTS—MORTGAGES—NOTES.
   The assignment of a note which is secured by mortgage carries with it in equity an assignment of the mortgage, the security for its payment.

5. SAME—VENDOR'S LIEN—EQUITABLE LIEN—REAL ESTATE.
   An assignment of the liability for the purchase money of real estate carried with it, in equity, an assignment of the vendor's lien which was security for its payment.

6. LIMITATION OF ACTIONS — VENDOR'S LIEN — ENFORCEMENT — EQUITY.
   The vendor's lien being in the nature of an equitable mortgage, and having priority over assignees in bankruptcy or a general assignee for the benefit of creditors, may be enforced as against the land, even though the statute of limitations has run against the personal liability of the vendee.[1]

OSTRANDER, C. J., dissenting.

Appeal from Kent; McDonald, J. Submitted April 17, 1918. (Docket No. 113.) Decided September 27, 1918.

[1]See note in 39 L. R. A. (N. S.) 1171.

Bill by Margaret Lavin against Jeremiah Lynch, an incompetent, and others to enforce an equitable lien and for an accounting. From an order dismissing the bill, plaintiff appeals. Reversed.

E. A. Maher, for plaintiff.

Joseph Renihan, for defendants.

It appears by the bill in this case that at the time of his death, December 24, 1881, Patrick Lynch was the owner of certain real estate in Kent county. By his will it was devised to Jeremiah Lynch, subject to the payment of $400 to Mary Wheeler; $1,200 to Johanna Simonds, and $900 to plaintiff. These sums were not to draw interest for three years, but thereafter should draw interest at six per cent. This will was not admitted to probate until December 10, 1915, the interested parties having agreed that it would be unnecessary as they could settle among themselves. On April 20, 1910, the legatees above named executed to Jeremiah Lynch quitclaim deeds of the lands so devised by Patrick Lynch to Jeremiah, he agreeing to pay to them respectively the amount of their several bequests. Jeremiah Lynch has become mentally incompetent, and his daughter, Mary Ellen, has been appointed his guardian. None of such amounts so agreed to be paid by Jeremiah have been paid. Mary Wheeler and Johanna Simonds have assigned their claims and interests to plaintiff who filed this bill July 6, 1916. She seeks by this bill an accounting, a decree determining and enforcing by foreclosure a vendor's lien upon the premises so deeded by quitclaim deeds, and also prays for general relief. Defendant Mary Ellen Lynch, as guardian for her father, moved to dismiss the bill on various grounds, among them the statute of limitations. The trial court dismissed the bill on this ground and plaintiff appeals.

FELLOWS, J. (*after stating the facts*). That the vendor of real estate who takes no security for the payment of the purchase price has an equitable lien for such purchase money upon the lands so sold has long been the established rule. *Carroll* v. *Van Rensselaer,* Har. Ch. 225; *Michigan State Bank* v. *Hastings,* 1 Doug. 225, 258; *Appeal of Palmer,* 1 Doug. 422; *Hiscock* v. *Norton,* 42 Mich. 320; *Dunton* v. *Outhouse,* 64 Mich. 419; *Curtis* v. *Clarke,* 113 Mich. 458; *Kulling* v. *Kulling,* 124 Mich. 56; *Lyon* v. *Clark,* 132 Mich. 521; *Shaw* v. *Tabor,* 146 Mich. 544; 39 Cyc. p. 1787. In the case of *Michigan State Bank* v. *Hastings, supra,* it was said by this court:

"Such liens exist independently of any express agreement, and courts of equity enforce them, on the principle that a person, having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not pay the consideration money."

And in Cyc., *supra,* it is said:

"A vendor's implied lien, as distinguished from a lien expressly reserved, or from the security which the vendor has while he holds the legal title under an unexecuted contract to convey, is the equitable right, which by implication is accorded to one who has conveyed the title to land without reserving a lien thereupon, and has taken no security for the purchase-money other than the personal obligation of the purchaser, to subject the land in equity to the payment of the purchase-price, when the rights of others are not injured and it is equitable so to do. * * *

"The principle on which a vendor's lien is generally regarded as resting is one of natural justice, that one who gets possession of the estate of another ought not in conscience be allowed to keep it without paying the consideration, although other grounds, such as the presumed intention of the parties, or the existence of a trust between them, have been assigned."

This lien attaches notwithstanding the fact that the

sale did not convey a title in fee, or a legal title, but only an equitable right or interest. *Ortmann* v. *Plummer,* 52 Mich. 76; *Warren* v. *Fenn,* 28 Barb. (N. Y.) 333; *Bledsoe* v. *Games,* 30 Mo. 448; *Loomis* v. *Railroad Co.,* 17 Fed. 301; *Curtis* v. *Buckley,* 14 Kan. 449; *Board* v. *Wilson,* 34 W. Va. 609 (12 S. E. 778).

In the case of *Ortmann* v. *Plummer, supra,* Mr. Justice CAMPBELL said:

"The right of a vendor to a lien does not seem to be confined to the sale of a legal title or title in fee. The leading case of *Mackreth* v. *Symmons,* 15 Ves. 329 (1 Leading Cases in Equity, 194, and notes) was one relating to what was treated as an equitable title. The doctrine has been applied to copy-holds, and appears to be received as to all recognized title. See Adams' Eq. (7th Ed.) p. 128, and notes; *Winter* v. *Lord Anson,* 3 Russ. 488. The lien on an equitable title may no doubt be more uncertain, by reason of the danger that *bona fide* purchasers from the legal holder may intervene and destroy it. But subject to that risk (which is not confined to equitable estates) it may be upheld. In the present case the legal title is still in the railway company, having knowledge of the equities, and defendants are not *bona fide* purchasers. We see no difficulty in the nature of the title."

The case of *Robinson* v. *Woodson,* 33 Ark. 307, is not unlike the instant case upon principle. In that case the vendor executed a deed reserving a lien on the land for the purchase money. Afterwards he executed another deed containing no reservation but acknowledging payment of the purchase price, although it had not in fact been paid. It was held that he had a vendor's lien which was enforceable in a court of equity.

When this plaintiff and her assignors, on the 20th day of April, 1910, executed to Jeremiah Lynch their respective quitclaim deeds of the premises, thereby conveying to him their respective interests therein un-

der the will of Patrick Lynch, deceased, taking his unsecured promise to pay the purchase price therefor, they each held, by virtue of such transaction, a vendor's lien for the payment of such purchase price. Was such lien assignable? While the courts are not in harmony on this question we think it must be answered in the affirmative. *Curtis* v. *Clarke, supra; Dryden* v. *Frost,* 8 L. J. Ch. (N. S.) 235; *Buford* v. *McCormick,* 57 Ala. 428; *Felton* v. *Smith,* 84 Ind. 485; *State Bank of Iowa Falls* v. *Brown,* 142 Iowa, 190 (119 N. W. 81); *Dickason* v. *Fisher,* 137 Mo. 342 (37 S. W. 1114); *Armstrong* v. *Farr,* 11 Ont. App. 186; *Board* v. *Wilson, supra.* The transfer of a note which is secured by mortgage carries with it in equity an assignment of the mortgage, the security for its payment. *John Schweyer & Co.* v. *Mellon,* 196 Mich. 590. So here we think an assignment of the liability for the purchase money carried with it, in equity, an assignment of the vendor's lien which was security for its payment.

Such vendor's lien is in the nature of an equitable mortgage (*Clark* v. *Stilson,* 36 Mich. 482; *Balow* v. *Insurance Co.,* 77 Mich. 540), and has priority over assignees in bankruptcy, or a general assignee for the benefit of creditors (*Lyon* v. *Clark, supra*). This being its character, it may be enforced as against the land even though the statute of limitations had run against the personal liability of the vendee. *Stringer* v. *Gamble,* 155 Mich. 295 (30 L. R. A. [N. S.] 815).

The very nature of the right precludes its enforcement at law. An equitable proceeding is necessary to establish and enforce it. The authorities already cited and the nature of the right demonstrate this. We have considered all the grounds set up in defendant's motion to dismiss. None of them are tenable. The bill sets forth a cause of action for equitable relief.

The decree of the court below must be reversed and

the demurrer overruled. Defendant will have the usual time to answer. Plaintiff will recover costs of this court.

BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred with FELLOWS, J.

OSTRANDER, C. J. (*dissenting*). The bill was filed July 6, 1916. It is charged therein:

"II. That at the time of his death the said Patrick Lynch was the owner in fee simple of certain lands and premises situate and being in said county of Kent, known and described as follows, to wit: the southeast quarter of the northwest quarter and the west half of the northeast quarter of section 31 in township 7 north, range 12 west, and of lot 24, in block 2 of Gunnison's subdivision in the city of Grand Rapids, in said county.

"III. That the said Patrick Lynch, previous to the time of his death had executed an instrument which he intended as his last will and testament, which provided that all of his estate should go to his son, Jeremiah Lynch, the defendant in this case, subject to certain specific legacies and other directions. That among the specific legacies was one to Mary Wheeler for the sum of four hundred dollars, to Johanna Simonds for the sum of twelve hundred dollars, and to this plaintiff (then Margaret Lynch) for the sum of nine hundred dollars. That said amounts should be without interest for three years after the death of said Patrick Lynch and should draw interest at the rate of six per cent. per annum after that period of time.

"IV. That it was arranged and agreed by and between the heirs at law and next of kin of said Patrick Lynch, deceased, that it was unnecessary to have said will presented for probate; that they would arrange for a settlement of the estate of said Patrick Lynch, deceased, without probating said will, and it was further agreed by the said Jeremiah Lynch, that he would pay to the above named Mary Wheeler, Johanna Simonds and the said plaintiff herein, the several amounts which the said instrument provided that they should receive from the said estate for their interests

in the lands and premises appertaining to said estate.

"V. That on the month of April, 1910, the said Jeremiah Lynch requested said Mary Wheeler, Johanna Simonds and this plaintiff to execute conveyance to him of said lands and premises, and agreed that if such conveyance were made he would pay to them respectively the several amounts of the legacies to them respectively provided for in the said will of Patrick Lynch, deceased. That on or about the 20th day of April, 1910, the said Mary Wheeler in pursuance of said request executed such a deed of conveyance to said Jeremiah Lynch, and on or about the 20th day of April, 1910, this plaintiff and Johanna Simonds in pursuance of said request also executed a deed of conveyance of said premises to said Jeremiah Lynch, and said deeds were recorded in the office of the register of deeds of said county of Kent on the 11th day of July, 1910, in liber 386 of deeds on pages 442 and 443 respectively.

"VI. That each of said deeds expressed a consideration of one dollar and other good and valuable consideration, and that the other and good valuable consideration mentioned in said deeds were the promises of said Jeremiah Lynch to pay to this plaintiff and to said Mary Wheeler and Johanna Simonds the amounts provided for in the will of said Patrick Lynch, deceased, as aforesaid.

"VII. That the said Jeremiah Lynch has never paid to this plaintiff or to said Johanna Simonds or Mary Wheeler respectively the said sums of money or interest thereon or any part thereof, which it was provided in the will of said Patrick Lynch, deceased, that they should be paid by said Jeremiah Lynch.

"VIII. That the said Mary Wheeler and Johanna Simonds have each assigned, transferred and set over to this plaintiff all of their claims and demands against the said Jeremiah Lynch, and the above described premises and all of their claims and demands against the estate of Patrick Lynch, deceased, for and on account of the provisions so made for them in the will of said Patrick Lynch, deceased, and the said plaintiff is now possessed of the right to demand, receive and maintain suits for the purpose of recovering the sums and amounts which were made due and pay-

able to this plaintiff by the terms of the said will of Patrick Lynch, deceased, and of the said promises and agreements of said Jeremiah Lynch together with all liens that the said Mary Wheeler and Johanna Simonds, as well as this plaintiff, had upon the aforesaid lands and premises."

It is further charged that Jeremiah Lynch has become and is mentally incompetent and that Mary Ellen Lynch is guardian of his estate, having been appointed March 8, 1916, that the will of Patrick Lynch was allowed December 10, 1915, and that Mary Ellen Lynch has been appointed to administer his estate. Upon information and belief it is charged that Mary Ellen Lynch has contracted with the other defendants to sell to them the said premises and that the vendees are in possession of them. Relief prayed for is an *account* of the amounts which the plaintiff and the said Johanna and Mary "became and were entitled to receive from said Jeremiah Lynch under the will of said Patrick Lynch," and that it be decreed that plaintiff has a lien upon the land—

"for the amounts which became due and owing to this plaintiff and to said Mary Wheeler and said Johanna Simonds respectively under and in pursuance of the terms of the will of said Patrick Lynch, deceased, and the agreement so made by Jeremiah Lynch to pay the same as aforesaid."

In default of payment, a sale of the land is asked for "to satisfy such lien." There is a prayer for general relief. On motion to dismiss, it was held that the cause of action is barred by the statute of limitations.

The will of Patrick Lynch is not set out in or with the bill, nor is the value of his estate or of what it consisted. Upon a motion to dismiss, we must deal with the facts set out in the bill. The bill charges that the testator bequeathed and devised all of his estate to his son Jeremiah, subject to *certain specific*

legacies. This imports that there was personal property. It does not import that the legacies were made a charge upon the real estate. Quite the contrary. It was agreed that the will should not be probated, and Jeremiah promised plaintiff and her assignors, the legatees, to pay them the amounts of their legacies. Apparently, this promise was made 33 years before the bill was filed. Jeremiah did not pay as he agreed he would, but when, in April, 1910, the will not yet having been probated, he wanted to secure apparent title to the real estate in himself, to make a sale of it, and for this purpose desired conveyances from the other heirs at law of his father, he renewed his promise to pay them their specific legacies. The plaintiff and her assignors conveyed their then apparent, but not real, title to the land. The will has since been admitted to probate. Nothing further than this can be gathered from the bill of complaint.

Assuming all charges made in the bill to be true, what present enforceable right of plaintiff is disclosed? Obviously, it is a right resting upon either (1) the will and the specific legacies therein given to them, or (2) upon the promises of Jeremiah. If upon the will, this is not the forum for asserting it, the estate being open and the probate court engaged in its administration. If upon the promises of Jeremiah, neither of them was made within six years before this suit was begun and neither is actionable in a court of equity. Plaintiff and her assignors do not claim that they ever had title, legal or equitable, to the land or ever sold it. Clearly, they never, in fact, had legal or equitable title to it. They never sold it, and it is not asserted that any portion of the purchase price, upon a sale, remains unpaid. They conveyed the land, in form, upon the repeated promise of Jeremiah to pay them, not the purchase price, but the amount of the legacies fixed in the will.

If we indulge the notion that upon the death of the ancestor plaintiff and her assignors had an equitable lien upon the estate, including the real estate, to secure payment of their legacies, the promises or denials of Jeremiah could not affect it, enlarge or diminish it, unless in relying upon them plaintiff and her assignors released the lien. If they did not release it, what has kept it alive for 34 years?

The decree should be affirmed, with costs to appellees.

SHARON *v.* FEE.

1. EQUITY—JURISDICTION.

Before the rule that, having jurisdiction of subject-matter and parties for one purpose, a court of equity may retain jurisdiction to settle all disputes relating to the same subject-matter between the parties, has application, some ground of equitable jurisdiction must, in any case, be not only asserted, but established.

2. SAME—MECHANIC'S LIENS—STATUTORY PROCEEDING.

A proceeding in chancery to foreclose a mechanic's lien is not one of general equity jurisdiction, but is wholly statutory.

3. SAME—JURISDICTION—PERSONAL JUDGMENT.

Because a court of equity is given jurisdiction, under the mechanics' lien law (3 Comp. Laws 1915, § 14796 *et seq.*), to foreclose a mechanic's lien, and may bring before it the claimants and owners and all contractors and materialmen interested, it does not follow that it may conclude every matter asserted by plaintiffs against them, find there is no lien, and yet give plaintiffs a judgment against some of the defendants upon an independent promise.[1]

[1]See notes in 14 L. R. A. (N. S.) 1036; 24 L. R. A. (N. S.) 321.

4. MECHANICS' LIENS — EQUITY — JURISDICTION — PERSONAL JUDGMENT.

There is nothing in the Michigan mechanics' lien law (3 Comp. Laws 1915, § 14796 *et seq.*) warranting the rendering of a personal decree in favor of the plaintiff against a contractor or subcontractor upon an independent promise of such contractor or subcontractor to pay plaintiff's claim.

Appeal from Wayne; Sharpe, J., presiding. Submitted June 14, 1918. (Docket No. 60.) Decided September 27, 1918.

Bill by Thomas Sharon and another against Ray M. Fee, Louis H. Spicer and Edwin C. Spicer, copartners as David Spicer's Sons, and others, to enforce a mechanic's lien. From a decree for plaintiffs against defendants Spicer, they appeal. Reversed, and bill dismissed.

James A. Robison (*Douglas, Eaman & Barbour*, of counsel), for plaintiffs.

Frank W. Atkinson, for appellants.

OSTRANDER, C. J. It was determined by the decree, and could not have been otherwise determined, that the theory of the bill is not sustained by facts. Instead of dismissing the bill as to all defendants, it is dismissed as to some, including the owner of the building, and a decree—a judgment—is entered for plaintiffs against some of the defendants, upon a theory wholly different from and opposed to the theory of the bill. It is sought to sustain this personal judgment by an application of the rule that, having jurisdiction of subject-matter and parties for one purpose, a court of equity may retain jurisdiction to settle all disputes relating to the same subject-matter between the parties. Some ground of equitable jurisdiction

must, in any case, be not only asserted, but established, before the rule relied upon has application.

This cause is not one of general equity jurisdiction. The proceeding is wholly statutory. The bill was filed August 26, 1915. There was then in force a law, 3 Comp. Laws 1915, §§ 14805, 14809, which read:

"(14805) SEC. 10. Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of *lis pendens* filed for record in the office of the register of deeds, shall have the effect to continue such lien pending such proceedings. And in such proceedings, the complainant shall make all persons having rights in said property affected or to be affected by such liens so filed in the office of the register of deeds, and all persons holding like liens so filed, and those having filed notice of intention to claim a lien, parties to such action. And all persons holding like liens or having filed notice of intention to claim a lien, or any other persons having rights in said property, may make themselves parties thereto on motion to the court and notice to complainant, and may file their intervening or cross-bills or answers claiming the benefit of cross-bills and notices of *lis pendens* therein. And whenever the principal contractor or any subcontractor shall have given to the owner, or other person or persons having rights in said property, any bond or surety or guaranty of any kind to protect such owner or other person or persons having rights in said property, against the liens provided for by this act, then the complainant or the owner or other person or persons having rights in said property, may make the surety or sureties in such bond or guaranty, parties to such action by such original bill or by cross-bills or answers claiming the benefit of a cross-bill, and the court shall thereupon settle and determine the rights and liabilities of all the parties in the matter, and make such decree as may be required to determine and enforce the rights and liabilities of the various parties including such surety or sureties. Intervening or cross-bills shall be on oath, and all bills sworn to shall be evidence of the matters therein charged, unless denied by answer under oath. Amendments may be made to any bill or cross-bill at any time before final order,

and if it shall appear that any party has had insufficient notice of any such proceedings, such further notice shall be given as the court shall think just."

"(14809) SEC. 14. Upon final decree the court may order a sale of the buildings or machinery separate, or the lands, buildings, machinery, structure, or improvements, together, by a circuit court commissioner or receiver, or may order the property into the hands of a receiver to be leased or rented from time to time under the direction of the court until the liens shall be discharged, or make such other order or disposition of the premises as justice may require. If upon the coming in and confirmation of the final report any portion of the liens shall still be unpaid, the court may enter personal decree for the same against the party who may be personally liable therefor, and execution shall issue for the same as upon other personal decrees rendered by the court."

The bill is filed to foreclose a mechanic's lien, the right to which, it is admitted by the bill, had been in form released. Ancillary relief asked for was the determination that the release was fraudulently secured by some of the defendants. It is found that what plaintiffs have is not a lien, nor any claim against the owner, but a cause of action upon an independent promise made by defendants Spicer. Because a court of equity is given jurisdiction to foreclose a mechanic's lien and may bring before it the claimants and owners and all contractors and materialmen interested, it does not follow that it may conclude every matter asserted by plaintiffs against them, find there is no lien, and yet give plaintiffs a judgment against some of the defendants upon an independent promise.

Whatever may be the proper rule as affecting the right of a plaintiff claimant to a personal decree against the owner (see 18 R. C. L. p. 991; 22 Am. & Eng. Ann. Cas. 1912A, 124, and note, p. 129 *et seq.*), there is nothing in our statute warranting the rendering of a personal decree in favor of the plaintiff

against a contractor or subcontractor upon an independent promise of such contractor or subcontractor to pay plaintiff's claim. Nor has this court, although applying a liberal rule, held to the contrary. *Koch* v. *Sumner*, 145 Mich. 358, *Scott* v. *Keeth*, 152 Mich. 547, *C. H. Little Co.* v. *L. P. Hazen Co.*, 185 Mich. 316, none of them goes so far, and in none will the reasoning employed sustain the decree in this case. Defendants Spicer are entitled to a trial by jury of the issue of their liability to plaintiffs.

The bill ought to have been dismissed as to all defendants, and such a decree should be entered in this court.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

LANDSBERGER *v.* JOYCE.

1. CONTRACTS—SUBSEQUENT AGREEMENT—CONSIDERATION.
   In an action for the purchase price of goods sold and delivered, the fact that defendants paid the freight, when it should have been paid by plaintiff, could not affect the question as to whether a new arrangement was made whereby defendants were to pay a certain amount of the purchase price, the freight to be deducted, and plaintiff to receive the goods back.

2. SAME—ACCEPTANCE—APPEAL AND ERROR.
   A finding of the court below that defendants did not accept the terms of plaintiff's offer to receive the goods back, *held*, sustained by the evidence and not opposed to the great weight of the evidence.

Error to Kent; Perkins, J. Submitted June 7, 1918. (Docket No. 73.) Decided September 27, 1918.

Assumpsit by Albert H. Landsberger against Albert L. Joyce and Albert E. Joyce, doing business as A. L. Joyce & Son, for goods sold and delivered. Judgment for plaintiff. Defendants bring error. Affirmed.

C. G. Turner, for appellants.

Eastman & Eastman, for appellee.

OSTRANDER, C. J. The suit is brought to recover the purchase price of certain goods sold and delivered to defendants by plaintiff. One shipment was made in November, 1914, $82.50, the other in August, 1915, $481.25. That the goods were originally sold to, delivered, and received by defendants is not disputed. That they had not been paid for when suit was begun is not disputed. There is no contest about quality, quantity or price. There is no controversy whatever over the November item. The declaration is upon the common counts in assumpsit, the plea the general issue. With the plea defendants gave notice that they would show, in defense of the action,—

"that said goods mentioned in the declaration in said cause were ordered by said defendants for fall delivery with an understanding that said goods should not be delivered until the latter part of November, 1915, and that said defendants should have thirty days and sixty days after delivery at that time. That said goods were shipped by said plaintiff in the summer time of 1915, when said plaintiff knew that said goods could not be used by said defendants as they were winter goods, and that said defendants could not use them at that time and so notified said plaintiff.

"Said defendants will also give in evidence and insist in their defense that just before the 1st of the year of 1916, the said plaintiff had another agreement with said defendants at the city of Grand Rapids,

Michigan, in which said plaintiff agreed that said defendants need not pay for the goods, and that said plaintiff would take the same back and notify said defendants where to ship them.

"That said defendants held said goods as per last arrangement with said plaintiff subject to the order of said plaintiff, and still have the same subject to their order according to said agreement.

"That at the time said plaintiff took the amount of freight bills and other things connected with expenditures made by said defendants in relation thereto, and acquainted himself with all the circumstances in the matter, and agreed as above stated."

The cause was tried by the court without a jury. At the conclusion of the trial the court rendered, orally, an opinion, concluding with an order for judgment for the plaintiff. The attorney for defendants said:

"A stay of twenty days and findings of facts and law I would like to have made by the court."

And the court replied:

"Well, that is all right. I will file what I have said here. I will look that over, and if it is enough, in my judgment, I will file it as findings of fact and law."

Later, this opinion was filed as "findings of fact and law"; this in February, 1917. Still later, May 17, 1917, formal findings were filed, and in June, 1917, defendants filed exceptions thereto, one of which is that the court filed two findings, both of them against the law and evidence. It does not appear that the exceptions, as such, were ever brought on to be heard. Some of them are embodied in the reasons asserted on the motion for a new trial. The record shows the following as the formal findings:

"This cause having come on to be heard before the court without a jury, the court does hereby find the facts to be as follows:

"1. That in the year 1914, and for some years prior

thereto, the plaintiff was engaged in business in the city of San Francisco, in the State of California, as a merchandise broker and manufacturer of food products.

"2. That the defendants in the year 1914, and for some time prior thereto, had been engaged and were engaged in the retail business, having a store in the city of Grand Rapids, and one store in Traverse City, both in the State of Michigan.

"3. That on the 2d day of February, 1914, the defendants signed a written contract for the purchase from plaintiff of 50 cases of tomato nectar and 50 cases of individual clam bouillon, amounting to $481.00. That these goods were to be shipped 'on or about the fall of 1915,' and were to be paid for one-half 30 days and the balance 60 days from date of invoice.

"4. That on the 3d day of November, 1914, the defendants ordered from plaintiff ten cases of clam bouillon for immediate shipment, and on the 5th day of November, 1914, defendants made additional order from plaintiff of ten cases of clam bouillon, amounting in all to $82.50, and that these goods were shipped to the defendants on the 14th and 23d days of November, 1914, and terms of payment 30 days from date of invoice.

"5. I further find that the goods called for by the order of February 2, 1914, arrived and were accepted by the defendants at Grand Rapids, Michigan, the latter part of August, 1915.

"6. I further find that defendants made some complaint, because these goods arrived too early and that the plaintiff, to meet this objection, agreed to extend the date of the invoice from August 17th to October 17th, thus extending the time of payment 60 days beyond the original agreement.

"7. I further find that during the year of 1915 the plaintiff made persistent and repeated efforts to secure from the defendants payments of the invoice of the goods shipped November, 1914, of $82.50, and after November 17, 1915, plaintiff made repeated efforts to secure payment of the goods shipped in August, 1915. And I further find that defendants made no payments on any of the goods shipped.

"8. I further find that on the 2d and 3d days of

December, 1915, the plaintiff was in the city and called upon the defendants for the purpose of securing payment of his bills and, in order to reach an immediate settlement or adjustment, offered to take back one-half of the goods shipped in August, 1915, provided that the defendants would immediately pay the balance of the goods shipped August, 1915, and also the bill of $82.50 for goods shipped November, 1914. Defendants refused to accept this offer. I further find that this was the only arrangement or agreement or understanding that the plaintiff had with the defendants on this occasion.

"CONCLUSIONS OF LAW.

"1. I therefore conclude, as a matter of law, that the defendants are indebted to the plaintiff, and that the plaintiff is entitled to recover from the defendants the sum of five hundred seventy-nine and .06-100 dollars, and that judgment be entered in favor of said plaintiff against said defendants for that amount, with costs of this suit to be taxed."

As plaintiff also asked for formal findings and these formal findings were made, they must be considered as the findings of the court. Judgment was entered, and a motion for a new trial was denied.

There are 18 assignments of error. In the brief for appellants, it is said:

"The only question involved in this suit is whether or not the agreement entered into on the 3d day of December, 1915, as testified to by Mr. Joyce and his bookkeeper, Mr. Cherwenka, was a binding agreement; and whether or not there was any consideration for the same."

This must be referred to the 8th finding of fact and both to the 13th and the 18th, and perhaps to other, assignments of error.

If the contention of appellants is apprehended, it rests upon a ruling made by the court, and stated in the opinion delivered by the court, to the effect that whichever way the fact might be found as to the

claimed rescission of the contract of the parties, and whether plaintiff did or did not agree that defendants need not pay for the goods shipped in August, 1915, and that plaintiff would take them back, there was no valid consideration for any such new promise and agreement. Defendants contend there was a valid consideration, which was this: The order, the printed form, called for a shipment in August, 1915, of goods f. o. b. San Francisco. The order printed in the record and exhibited to this court at the argument shows the words "San Francisco" crossed by a line and above San Francisco is written in "G. Rapids." The freight was $17, and was in fact paid by defendants. They say, therefore, that the court was in error in saying that the obligation rested upon defendants to pay the freight; that when the alleged agreement was made to take back the goods plaintiff had $17, the freight money, which belonged to defendants, and, the alleged agreement being to take back the goods at Grand Rapids and to leave them in defendants' storage until shipping directions should be given, there was legal consideration for the promise. Plaintiff's attorney, in the brief and at the hearing, insisted that, as produced in the trial court, the order called for goods to be shipped f. o. b. San Francisco, saying that it would have been a very easy matter to have settled this question beyond any doubt if such a claim had been made at the time of the trial and intimating that the erasure and interlineation now shown upon the face of the order would have been observed at the trial if it had then appeared on the order. It is not at all likely that any one connected with this case altered the form of the order. Its form may have been overlooked. The significance of an order f. o. b. Grand Rapids may have escaped proper notice. But the fact has no possible significance as affecting the proper conclusion.

Suppose defendants paid $17 as freight when freight should have been paid by plaintiff. One of two things resulted: Either it was a payment on account, or it created a right of action for its recovery. It did not and cannot affect the question of whether a new agreement was made to take back the goods, because the defendants' testimony is that in the alleged new agreement plaintiff advised defendants that the freight would be allowed, to be deducted when defendants paid the account of $82.50. Beyond this, there is the 8th finding of fact, and it is not contended there was not some evidence to sustain the finding. Nor is the finding opposed to the great weight of evidence.

Assuming, therefore, that the defendants are right in the contention that the original order called for a shipment f. o. b. Grand Rapids, no error appears, and the judgment must be affirmed.

A motion to strike the brief of appellee from the files because of unwarranted allusions to the form of the order for the goods, and because of insinuations contained therein that the order as it now appears is in form different from the order produced in the trial court, is in form denied, although the court is of opinion that there is no evidence warranting the conclusion that the order has been altered. It has already been suggested that more important things than this have been overlooked in writings by both counsel and courts. It is not improper to suggest that when a matter may be reasonably explained and probably accounted for without impugning motive it is at least not gracious to charge, or insinuate, that bad motives and improper conduct are indicated.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

NEWCOMBE v. NEWCOMBE.

DIVORCE—ALIMONY—DECREE—MODIFICATION.

On appeal in divorce proceedings, the decree of the court below sustaining the validity of a separation agreement disposing of the property interests of the parties, but deducting $70 advanced to the wife by order of the court, will be modified by awarding her the full amount of the agreed settlement, and giving her a lien on plaintiff's farm to secure performance.

Appeal from Allegan; Cross, J. Submitted July 18, 1918. (Docket No. 108.) Decided September 27, 1918.

Bill by Christopher Newcombe against Catherine Newcombe for a divorce. From a decree for plaintiff, defendant appeals. Modified and affirmed.

Perle L. Fouch (*Charles Thew,* of counsel), for plaintiff.

Clare E. Hoffman, for defendant.

OSTRANDER, C. J. The parties were married October 26, 1914, and lived together until March 12, 1917. The bill was filed March 19, 1917, and it is charged therein that plaintiff is 70 years of age and that the defendant claims to be 47 years old. No children were born of the marriage, there is very little property. Plaintiff charges that the defendant has been guilty of extreme cruelty in bestowing epithets, in the failure to perform the duties of a housewife, in threatening him with personal violence. Defendant, in her answer, professes affection for plaintiff and says that the interference of others is responsible for the breach in a domestic life which has been, and otherwise would have continued to be, reasonably com-

fortable. She denies the charge of cruelty, and asks that the bill be dismissed and a certain agreement of the parties, purporting to have been made for a separation and a division of property, be set aside as fraudulent.

Before his marriage to defendant, plaintiff was a bachelor, living on a 40-acre farm inherited from his father, possessing some, but not much, personal property, and owing a small debt secured by mortgage on the realty. Little appears about his antecedents, but he seems not to have gone far in bettering his fortune, and if the parties could contentedly live together there is reason for believing that he would live longer and fare better with defendant than he will without her and her assistance. Defendant was for more than three years before her marriage to plaintiff his housekeeper. She brought with her one son by a former marriage. She has sometimes done a man's work on the farm, and has managed, more or less, the disposition of the proceeds of the farm. That she has ever misappropriated plaintiff's money is not proven. The testimony given by the parties is conflicting, and that supplied by friends and neighbors does not tend very strongly to support the charges made in the bill. Plaintiff professes to be afraid of defendant—afraid of personal harm. He left her and his home March 12, 1917, complaining that she had threatened to kill him. In some way the prosecuting attorney and a deputy sheriff were informed that an attempt had been made by her to do him personal injury. The prosecuting attorney, upon investigation, found no occasion for official action and seems to have been at once engaged as counsel for plaintiff, for whom he was also a witness at the hearing.

On the 13th day of March, 1917, the parties executed a writing which in terms recites that they have separated and intend to live separate and are desirous

of settling property affairs. The defendant, in consideration of $450 and some other personal property, releases her right of alimony, dower rights, and claims to certain other specified personal property. It is probable that if carried out defendant will receive about $500 of value by this arrangement. She says it was procured by fraud, and by this she means, as her testimony is understood, that she was intimidated when she made the agreement by the prosecuting attorney, then her husband's solicitor, and was coerced into making it.

Testimony was given in open court, and the learned trial court found that plaintiff had sustained the material allegations in the bill and that defendant had been guilty of extreme cruelty. It was found that the aforementioned property settlement was a fair one and was not procured by fraud or duress, and that it ought to stand as a full settlement of property rights. A sum of money, $70, advanced to defendant by order of the court, is ordered to stand as a payment upon the $450 which, by the settlement, the plaintiff was to give to defendant.

Upon a review of the testimony, which it would profit no one to set out here, I agree with the conclusions that the divorce should be granted and that the property settlement ought to be approved. If she is to be believed, the effort to intimidate her and to force the settlement which was made is clearly made out. Independent of this, the action of the prosecuting attorney, counsel for her husband, was of a nature calculated to intimidate a weaker woman. I am not satisfied that it had this effect with the defendant. I find no reason for concluding that the sum advanced to defendant, pending the divorce suit, ought to be returned to plaintiff. Spouses may agree to live separate and apart from each other and may settle their property interests with that in view, but an agree-

ment to separate is not an agreement that either has cause for a divorce. An allowance in this case was proper to enable the defendant to live and to present in court her reasons why a divorce ought not to be granted to her husband.

The decree should be amended so as to allow to the defendant the benefit of the agreed settlement without diminution and so as to provide, if the sum of $450 has not been paid to defendant, that she have a lien upon plaintiff's farm to secure performance of the decree. In other respects, the decree is affirmed, without costs.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WATERS *v.* LAKEWOOD UTILITIES CO.

1. CONTRACTS—CONSTRUCTION—QUESTION OF LAW.
   Where a written contract provided that the receivers of a railroad company were to furnish the material for a side track, of which they were to remain the owners, and defendant was to pay the cost of construction, *held*, that the finding of the court below that the contract was not ambiguous, and that defendant was to pay only for the labor of constructing said side track, was not erroneous.

2. WORDS AND PHRASES—"CONSTRUCTION"—DEFINITION.
   "Construction" means the process or act of constructing, the act of building; erection; the act of devising and forming; fabrication; composition.

3. APPEAL AND ERROR—INCONSISTENT CLAIMS.
   Where plaintiffs claimed upon the trial that the contract was unambiguous and should be interpreted by the court,

which view was accepted by the court, they refused the benefit of any admission of defendant in its answer that evidence should be admitted to explain the writing, which evidence it is now claimed would have shown that the cost of construction was much more than that allowed by the trial judge.

4. SAME—EXCEPTIONS—ASSIGNMENTS OF ERROR—SET-OFF—DEMURRAGE.

A claim that under the holdings of the Federal courts, in an action for freight charges, the shipper cannot maintain set-off for damage claims, the court below was in error in allowing set-off for cost of constructing side track against demurrage charges, will not be considered by the Supreme Court, on error, where there is no exception referred to which raises the point, and no specific assignment of error.

Error to Muskegon; Sullivan, J. Submitted June 11, 1918. (Docket No. 87.) Decided September 27, 1918.

Assumpsit by Dudley E. Waters and another, receivers of the Pere Marquette Railroad Company, against the Lakewood Utilities Company for the construction of a side track and for demurrage charges. Judgment for defendant on a directed verdict. Plaintiffs bring error. Affirmed.

Charles B. Cross and *Wallace Foote* (*Parker, Shields & Brown,* of counsel), for appellants.

Alex. Sutherland, for appellee.

In so far as the terms of a certain contract executed by the parties are of importance here, they are as follows:

"Agreement, made this 7th day of February, A. D. 1914, between Lakewood Utilities Company, a corporation of the State of Maine, hereinafter for convenience called 'the first party,' and the Pere Marquette Railroad Company (for itself and all companies which now or shall hereafter use its tracks), hereinafter

called 'the second party,' and Frank W. Blair, Dudley E. Waters and S. M. Felton, receivers of the property and business of the said company, hereinafter called 'the receivers.'

"The first party has requested the second party and the receivers to construct one side track to be located at Lakewood, Michigan, connecting with second party's main line 431 feet north of location stake 3,500, and extend in a southeasterly direction 280 feet, for the convenience of the first party in receiving and shipping freight. In consideration of the representations, promises and undertakings of the first party and upon the conditions and with the reservations hereinafter stated, the second party and the receivers hereby agree to comply with such request as soon as practicable after the execution of this agreement.

"Wherefore, this writing witnesseth:

"1. Said side track shall be constructed, substantially according to the plan hereto attached ..... feet, or thereabouts, thereof being upon land owned or controlled by the first party, and two hundred eighty (280) feet, or thereabouts, being upon land owned or controlled by the second party and the receivers. The first party hereby represents that it has lawful authority to permit the second party, the receivers, and other companies using their tracks to construct and use said side track according to said plan and the terms of this agreement, beyond the limits of the second party's and the receivers' premises; and the first party hereby grants to the second party, the receivers, and such other companies, the right to construct and use said side track in accordance with the terms thereof, and hereby agrees to indemnify and save the second party, the receivers, and such other companies, harmless of and from all damages, costs and expenses that may be suffered or incurred by either on account of any claim of trespass or other claim by any third party or parties, arising from the construction or use of said side track.

"2. The material for the construction of said side track shall be furnished by the second party and the receivers. First party agrees to pay to the second party and the receivers, in advance of the construction of said side track, the sum of $565.91, the estimated

cost thereof, and in case the actual cost shall exceed said sum, it will on demand pay the balance of such cost to second party and the receivers. Second party and the receivers agree that in case the actual cost shall be less than said sum, they will refund the difference to the first party. The said side track, including ties, rails, switches and crossing material, if any, shall be and remain the property of the second party, the receivers and its or their assigns, and under its or their exclusive control, except as herein otherwise stated; and the second party, the receivers and such other companies, shall have the right to use the whole or any part of said side track for other business than that of the first party, when it will not interfere with the first party's business, without any allowance therefor to the first party and without restriction except as herein stated."

The contract in other respects is calculated to secure to the plaintiffs the carriage of freight, in and out, for defendant, the use by plaintiffs of the side track. Defendant paid the amount of the estimated cost. The side track was in fact constructed before the written agreement was executed. The actual cost, including materials, was $619.52. The actual cost for labor was $128.70. To recover the difference between the total cost and the sum paid, and to recover certain items of demurrage, about which there is now no dispute, this action was begun.

Defendant, regarding the contract as ambiguous in meaning, gave notice with the plea that it would prove and insist in its defense that it was understood and agreed that the sum advanced by it to pay for the construction was to be used to pay for the actual cost of the labor and ties and other material of a temporary and perishable character only, and that accordingly it would show that the actual cost of construction was $335.63. Plaintiffs, with whom the court agreed, maintained that the contract was not ambiguous, and its meaning was for the court. Upon the subject the learned trial judge said:

"Now, there is the agreement. The material was to be furnished by the railroad company. And the further provision in this agreement that provides that the material shall remain the property of the Pere Marquette Railroad Company, and the actual cost of construction would be what the expense would be of putting this side track down, and, as the court construes it, it only means the labor of putting the side track in, and that is what the contract speaks for itself and that is what the court construes the contract to be.

"Now, there was paid, according to this agreement, $565.91, and the cost of the labor with the interest is $141.57, so that there would be left, according to the contract, a difference to be paid to the defendant of that item of $424.34, with interest from the time that the money was paid, and that interest is $91.93, according to the computation, making the whole amount due to the defendants at this time, $516.27, if that was all there was to this lawsuit, but besides that the plaintiff claims demurrage amounting to $128, and against that there was no off-set. The demurrage with the interest from the date it was due is $26.60, making $154.60 to be deducted from $526.27. We are settling this lawsuit, and there is due from—there is due to the defendant, the sum of $361.67, so your verdict should be for the defendants, you find that there is due to the defendants the sum of $361.67, and you do that by direction of the court."

A verdict and judgment for defendant followed.

Plaintiffs, appellants, contend here (1) that by the terms of the contract the entire cost of the side track is chargeable to defendant, (2) that, in any event, there can be no set-off to its demand for demurrage.

OSTRANDER, C. J. (*after stating the facts*). Admitting appellants' contention that the contract is not ambiguous, is not open to explanation by evidence, and that its meaning is to be found by the court, the construction placed upon it by the court may be sustained. The writing recites a request made by the

defendant "to construct one side track," the agreement is that it shall be constructed, that the materials for construction shall be furnished by the plaintiffs, and shall be and remain the property of the plaintiffs. To construct is to bring together, to put together, the constituent parts of something in their proper place and order; to build; to form; to make; as, to construct an edifice. Synonyms are, to build; to erect; form; compile; make; fabricate. Construction means the process or act of constructing, the act of building; erection; the act of devising and forming; fabrication; composition. *Vide* Webster's Inter. Dict. If nothing had been said about materials, it would have been open to question by whom they were to be furnished, and perhaps the necessary inference would be that defendant was not to furnish them. But the agreement is that plaintiffs are to furnish the materials for construction and to be and remain owner of them. To furnish is not, necessarily, to give, nor, necessarily, to receive pay for what is furnished. To furnish is to supply with anything necessary, useful or appropriate; to provide; to equip; to fit out; to fit up; adorn. A secondary meaning is to give something. *Vide supra.* A thing useful to both parties was to be constructed, materials to be furnished by the plaintiffs, who remained owners of them, construction to be paid for by defendant. The single provision which may seem to negative the idea that only cost of construction was to be charged to defendant is the one fixing the estimated cost. But if we exclude evidence of what in fact the cost of labor, and the cost of materials, was, the apparent difficulty is obviated, because, if the estimated cost was too much a refund was provided for. Upon plaintiffs', appellants', theory then, it does not appear that error was committed upon this branch of the case.

Plaintiffs' general and main contention, too, nega-

tives any idea of accepting and using for their benefit the statement in the notice given by defendant that no more than $335.63 was the sum to be paid for the side track. They refused the benefit of the fact (assuming that it is an admission) upon the trial. In substance, the portion of the notice referred to asserts that extrinsic evidence ought to be received to explain the writing, and, being received, it would appear that the construction as agreed upon cost no more than $335.63, a position which plaintiffs at the trial denied and here deny. They insisted that the contract was to be interpreted by the court, according to its terms. They cannot maintain both positions.

The effect of the action of the trial court was to allow defendant to pay a claim for demurrage by setting off its cross-demand against plaintiffs. The Federal courts have held that in an action for freight charges the shipper cannot maintain a set-off for damages but must bring an independent action. *Illinois Cent. R. Co.* v. *Hoopes & Sons*, 233 Fed. 135; *Johnson-Brown Co.* v. *Railroad*, 239 Fed. 590; *Chicago, etc., R. Co.* v. *Stein Co.*, 233 Fed. 716. The reason for the rule of the Federal courts is based upon the laws forbidding rebates and discriminations and the facility with which, under the guise of a claim for damages, a rebate of freight charges might be secured. Appellants discuss this point, contending that in principle no distinction can be made between a demand for freight and a demand for demurrage, but there is no exception referred to which raises the point and no specific assignment of error. Therefore, it will not be considered.

The judgment must be affirmed, and in this view the court below was right in awarding costs to defendant.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

DROPPERS v. MARSHALL.

1. HOMESTEADS—CONTRACT TO CONVEY—VALIDITY—LAND CONTRACTS—VENDOR AND PURCHASER—DEFAULT.

   A contract to convey a farm consisting in part of the homestead, signed by the husband alone, is binding upon him; and his default in failing to perform may be made the basis of an action for damages.[1] OSTRANDER, C. J., and MOORE, J., dissenting.

2. VENDOR AND PURCHASER—BREACH OF CONTRACT—MEASURE OF DAMAGES.

   In an action for damages for the breach of a contract to convey land, the plaintiff is entitled to recover the difference between the price fixed by the contract and the market value thereof.

3. VARIANCE—TRIAL—PLEADING—INSTRUCTIONS.

   Where the case was submitted to the jury upon a theory wholly at variance with the theory of the declaration, the judgment of the court below will be reversed.

Error to Kent; McDonald, J. Submitted June 18, 1918. (Docket No. 46.) Decided September 27, 1918.

Assumpsit by Anthony C. Droppers against Ernest W. Marshall for breach of a land contract. Judgment for plaintiff. Defendant brings error. Reversed.

Hatch, McAllister & Raymond, for appellant.

Herman & Johnson, for appellee.

OSTRANDER, C. J. (*dissenting*). The defendant owned 119 acres of land. Under date December 5, 1916, he and plaintiff executed a writing, by the terms of which he was to sell and plaintiff to buy the land and some personal property for $16,000, upon certain terms. The terms of payment were $500 December 5, 1916, and this was paid; $500 on or before March 1,

[1] See note in 8 L. R. A. (N. S.) 748.

1917, when a note and mortgage for the balance was to be given, to draw interest at the rate of 5 per cent. per annum, to be paid, $100, plus interest, annually, with the privilege of paying more than $100. The land is described in the writing as being in the township of Byron, Kent county, Michigan, and consisting of the east half of southeast quarter and southeast quarter of northeast quarter, less one acre. No section is given in the contract, and none is mentioned in the briefs, but in the testimony it appears that the land is on section 8. The three forties abut upon a highway, the middle forty acres is a homestead occupied as such by defendant and his wife. The wife did not sign the writing. Defendant refused to perform. In his testimony he assigns as a reason that by the terms of the contract the payments might continue for 150 years and that he asked the vendee, who refused to do so, to amend the contract in this respect. Plaintiff sued to recover his damages, declaring upon the contract and setting up the breach by defendant. With the plea defendant gave notice that at the time the contract was executed he was a married man, living with his wife on the land, that the land includes his homestead, and that he would insist that the contract is void because not executed by his wife. The cause coming on to be heard, the attorney for the plaintiff made an opening statement to the jury in which no intimation is given of a theory of recovery other than that the contract as made has been breached by defendant and that damages were claimed for the difference between the value of the farm and the contract price.

The theory of plaintiff, according to which he was permitted to recover, is, that in negotiations which preceded the making of the writing defendant valued each forty acres, the middle forty—the homestead—at about $10,000, the others, together with the personal property, at $7,000, and that, assuming the con-

tract to be void as to the homestead, it was valid as to the remainder and he could recover so much as the property other than the homestead was worth over and above the price so put upon it by defendant. Over objection and exception, he introduced testimony upon this theory, his precise testimony on this point being, "He valued the buildings between $6,000 and $7,000," the forty the buildings were on "about $3,000," "with the personal property and the woods on the other 40's, he valued that at $7,000." He testified further:

"*A.* We talked about buying the entire 120 first, that is what he wanted to sell, and then I would rather only have 80 acres, and I asked him 'what will you take for the 80 acres with the buildings on?' 'Well,' he says, 'I don't care about selling 80 acres.' He says, 'I want $10,000 for the 40 with the buildings on.'

"*Q.* What did you say to that?

"*A.* I says, 'that is all right.' I says, 'that 40 is worth $10,000 with the buildings on, but,' I says, '$6,000 for the other two 40's is almost too much.' I says, 'I will have to go home and think that over again.' That was on Saturday.

"*Q.* And when did you have your next conversation?

"*A.* That was on the next Tuesday when we went to draw up the contract.

"*Q.* And what was said then?

"*A.* Then we talked it over again and I said 'the 40 with the building suited, for $10,000, suited me all right.' * * *

"*Q.* What was said about the personal property?

"*A.* Well, we dickered around for awhile. He had a young team of horses there and I wanted him to put in a young team of horses with the other two 40's, and finally we dickered around and I got the two other horses, the roan and the bay mare. That was the team mentioned in the contract; and the rest of the personal property mentioned in the contract.

"*Q.* And what did you say when he offered to put those things in that are mentioned in the contract?

"*A.* I says, 'if you figure that then for $10,000 and the other two 40's for $6,000, including the personal property, we will call it a bargain.

"*Q.* And did he agree to that?

"*A.* He agreed to that.

"*Q.* Then did you go down to have the papers drawn?

"*A.* Then we talked some about the terms, and—

* * *

"*Q.* Well, as I understand then, when that proposition was made for $10,000 for the 40 with the buildings on and $6,000 for the others, including the personal property, did you say you would do that?

"*A.* Yes.

"*Q.* Did he say he would do that?

"*A.* Yes. Then we went down and had the contract drawn."

Defendant denies putting a value upon separate parcels or any agreement to that effect. He asked $16,000 for the farm and, to make the deal, included the personal property described in the contract.

Upon this point, which involves the principal issue in the case, the court instructed the jury:

"The written instrument is silent as to the contract price of the separate 40's, so you must determine the contract price from the oral testimony of the witnesses. As to this question, the plaintiff says that the contract price was $6,000 for the two 40's. That is, the plaintiff says that before they entered into the written contract they had agreed that the price of the two 40's was to be $6,000; the price of the homestead was to be $10,000. The defendant says that there was no agreement as to the contract price except the price mentioned in the written contract, that is, in the written contract, the price mentioned in the written contract for the farm as a whole, $16,000; says that independent of that amount fixed in the contract, there was nothing said between him and the plaintiff as to what the 40's separately were worth at that time.

"Now, under the circumstances of this case, the

plaintiff cannot recover any damages other than that represented by the tender which has been made into court until he has convinced you by a fair preponderance of the evidence that a price was agreed upon for the two 40's separate from the other 40, that is, from the homestead 40; I mean that a price was agreed upon before the written instrument was signed by the parties.

"It is a general rule of law that a written instrument cannot be—that oral testimony cannot be received to vary or alter or contradict the terms of a written instrument. That is based upon the presumption that when the agreement between the parties is reduced to writing, it contains all the agreement. But I have permitted the plaintiff in this case to explain what the consideration mentioned in the written instrument was, how it was made up. If you find that the testimony that was given in that regard is not true, your verdict—he would not be entitled to any damages, and your verdict would be only for the amount which has been tendered into court, or if you find that there was no agreement separate from the written agreement as to the contract price of these two 40's, the plaintiff cannot recover. If you find that there was such an agreement, still the plaintiff cannot recover unless it appears that the real value of the two 40's was more than the contract price; that the real value of the two 40's was more than the contract price. If you find that there was a contract price and the real value was more than the contract price, the plaintiff would be entitled to the difference between the contract price and the real value; that is the measure of his damages."

The verdict returned was $1,260, which included $510, the tender made into court by defendant of the $500 paid to him on the purchase price, plus $10, and $750 damages. There was a motion for a judgment *non obstante* for $510, with costs to defendant, and, if this was refused, a motion for a new trial. These were denied, and a judgment was entered on the verdict.

Appellant has stated and argued the following propositions:

"1. Was not the written contract, which the parties had deliberately made controlling as to the terms of their agreement, and being entire and not severable, did not the fact that it embraced defendant's homestead and was not signed by his wife render it void so that it will not support an action for damages even as to the excess of land over and above the homestead?

"2. Was it competent, under the pleadings and the opening statement of plaintiff's counsel, for the circuit judge to allow a recovery upon a verbal agreement for the price of the two 40's outside of the homestead?

"3. All question of competency under the pleadings aside, was it competent for the circuit judge to submit to the jury the question of whether or not there was a verbal agreement for the price of the two 40's outside of the homestead?

"4. Could the contract for the sale of the land in question rest partly in parol?

"5. Was not the consideration for the written contract contractual and so was not evidence of a parol agreement as to the price of the two 40's outside of the homestead incompetent, for the reason that such evidence would add to and vary the terms of the written contract?"

Appellee says these propositions evade the real issues, which are:

"1. If a contract for the sale of certain lands includes the homestead and is not signed by the vendor's wife, can it be made the basis of an action for damages by vendee, and if so, what is the measure of damages?

"2. Where the lands covered by contract of sale consist substantially of three 40's, the center 40 comprising the homestead, and are described in the contract as the east one-half (½) of the southeast one-quarter (¼) and the southeast one-quarter (¼) of the northeast one-quarter (¼), etc., and the consideration is expressed in a single or lump sum, can parol

evidence be introduced to explain the consideration, that is, how it is made up?

"3. In the case at bar, could the above question be presented under pleadings and opening statement of counsel for plaintiff?"

From the manner in which the case was presented in the trial court and is presented here, some pains must be taken to state, with precision, the rights and obligations of the parties. For the purpose of recovering damages by one of the parties thereto, there can be no breach of a *void* contract. The term "void" as applied to a contract for or a deed of a homestead, not joined in by both the husband and wife, has its full significance. It means a complete nullity, without qualifications. The term is often applied with a meaning different from this.

"The term 'void' is perhaps seldom, unless in a very clear case, to be regarded as implying a complete nullity; but is to be taken, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case." *Brown* v. *Brown*, 50 N. H. 538.

In *Way* v. *Root*, 174 Mich. 418, 424, it was said:

"It is contended in behalf of defendant that the contract was void from its inception, and therefore cannot be made the basis of a cause of action, for the reason that the land described in it was owned by defendant and his wife together as tenants by entirety, and she did not join in executing the instrument. That the contract is invalid in so far as it is powerless to affect her interests in, or the title to, the property it describes is undoubtedly true. Neither a husband nor wife can alone convey or incumber the estate vested in them as tenants by entirety. In that light and for such purpose such an instrument has been held void by this court. * * * There is no limit on the amount or value of the realty which husband and wife may hold as tenants by entirety as in

case of a homestead, and they are not therefore analogous."

In *Lawrence* v. *Vinkemulder*, 157 Mich. 294, the land contracted to be sold was a homestead, but of a value much greater than the homestead exemption. Chief Justice BLAIR said:

"It being settled that a contract to sell and convey the homestead, signed by the husband only, is a mere nullity, it logically follows that no rights whatever can be predicated upon it. *Ex nihilo nihil.* To this effect is the overwhelming weight of authority."

The constitutional provision (article 14, § 2) is—

"* * * alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of his wife to the same."

This provision, as is pointed out in *Gadsby* v. *Monroe*, 115 Mich. 282, 285, deals with the land which constitutes a homestead, and not with any specific interest therein. See, further, *Hall* v. *Loomis*, 63 Mich. 709; *Lott* v. *Lott*, 146 Mich. 580 (8 L. R. A. [N. S.] 748). So a contract to convey land embracing a homestead was held "utterly invalid as an alienation in equity of the homestead." *Phillips* v. *Stauch*, 20 Mich. 369, 381, 382.

The decisions referred to, and many others made since the opinions in *Dikeman* v. *Arnold*, 71 Mich. 656, s. c. 78 Mich. 455, were handed down, are based upon reasoning which negatives the idea that with respect to a homestead an unperformed promise made by the husband to sell it may be made the foundation of an action for damages. It is obvious, therefore, that, when a mutual contract to sell and buy a homestead is attempted to be made, both parties are under obligations to see to it that what is done is not a nullity. No idea of a tort, a wrong, committed by the vendor can be entertained if the contract is not exe-

cuted by the wife nor because the husband does not procure the homestead to be conveyed.

Undoubtedly, the deed of the husband, the defendant here, of the remainder of the land, would be good and would convey the fee, subject to the dower interest of the wife. But it is to the writing and all of its terms that we must look to determine what the agreement of the parties was. If the premises sold are a tract of pine timber, or land containing a deposit of ore, and, as to a fraction of it, the contract is void because a homestead is included, it may be assumed that the main purpose of making the contract was to dispose of the timber or ore. Here, the plain purpose was to buy and sell a farm, with buildings, etc., etc., and that purpose fails because it is not to be presumed, and does not appear, that plaintiff wanted to buy two, separated, 40-acre pieces of land without buildings. The reasonable inference is, rather, that, the agreement for the whole farm failing, the whole purpose of making the contract failed.

What has been said is an attempt to show, among other things, that plaintiff is relying, in fact, upon a breach of an agreement absolutely void; that, eliminating the idea of a breach of the promise to convey the homestead, there is no contract, no bargain, and no breach.

Assuming, however, but not deciding, that if plaintiff, the vendee in the contract, desired it, specific performance of the contract to convey the remainder might be enforced in equity, if the terms upon which enforcement should proceed could be gathered from the contract, it is evident that the contract itself affords no means of determining any agreed upon terms. No separate value is placed upon the three parcels of land or upon the personal property. Time and manner of payment of the purchase price of the farm and personal property are fixed, but there has been no

agreement about the time and manner of payment of a much smaller sum, the value of two of the parcels.

Assuming that any valid contract was entered into, it is a contract to sell and buy two 40-acre pieces of land and some personal property. There is no evidence of any demand by plaintiff for performance of such a contract, none of a breach of it. It is illogical to say that he has lost the profits of a bargain, since he has neither demanded, nor been refused, the actual bargain he made. Beyond this, is the contention urged by defendant, namely, that the purchase price of the two 40-acre parcels is not fixed in the contract. Not only is this so, but the terms of the contract afford no method for ascertaining either that separate prices were fixed or determining what they were. The objection should have been sustained. We may go further and say there is no evidence, parol or other, of any agreement upon the price to be paid for the two 40-acre parcels. Giving plaintiff's testimony its greatest probative value, in the light of the written agreement, it does not prove an agreement to sell and buy those parcels at any price. There was no proper issue to submit to a jury, and a verdict for defendant should have been directed.

The judgment is reversed, with costs to defendant, appellant.

MOORE, J., concurred with OSTRANDER, C. J.

BROOKE, J. I am unable to agree with the conclusion reached by my Brother OSTRANDER in this case.

In the early case of *Phillips* v. *Stauch*, 20 Mich. 369, a suit identical with the one in the case at bar was presented to the court except that in that case the vendee under the written contract sought specific performance thereof while in the case at bar he seeks damages for its breach. After determining that a

decree for the conveyance of the homestead cannot pass, the court says:

"The remaining inquiry is whether the record discloses a case in which the court ought to require the defendant to convey what he can, by deed executed by himself alone, and compel him to make compensation for deficiency.

"There are certain principles which govern the court in administering this equity.

"In proceeding to give a purchaser something different from that which the vendor contracted to sell, the court is enforcing a contract which the parties never in fact made, and the jurisdiction is therefore to be exercised under many restrictions. * * *

"The farm in question in this case contains a little over 92 acres, and is valued by complainant at a trifle over $6,340, and by the defendant at about $4,600. To give relief on the principle of compensation as contended for, would exempt from the conveyance the homestead right of the value of $1,500, and embracing the dwelling house, and would leave the balance of the premises subject to the contingent right of dower of defendant's wife.

"This would necessarily exclude from the conveyance a very material part of the subject-matter of the contract, and almost certainly result in great pecuniary injury to all parties interested. The adjustment of the compensation would be quite difficult in a case like this, and especially that part of it founded on the contingent dower right. That is quite different from the case where the right is consummate. The interest of defendant's wife would also be exposed to some detriment by partial alienation. These considerations, taken together, inspire the opinion that the case is not one in which the court ought to compel the conveyance with compensation. The case appears to be a hard one for complainant, and we should be glad to relieve him if circumstances permitted.

"The decree below must be reversed, and one entered in this court dismissing the bill, but without prejudice to any proceeding at law the complainant may be advised to institute upon the bond for a deed mentioned in the pleadings."

In *Stevenson* v. *Jackson,* 40 Mich. 702, specific performance was decreed under a contract signed by the husband alone, where after breach the husband and wife had joined in a deed of the property to a third person. Again, in *Hall* v. *Loomis,* 63 Mich. 709, the court declined to enforce specific performance but affirmed a decree dismissing the bill without prejudice to proceedings at law.

In principle the case at bar is upon all fours with the case of *Dikeman* v. *Arnold,* 78 Mich. 455. In that case as in this the defendant had entered into a contract for the sale (exchange) of a farm, part of which constituted his homestead. It was there said:

"We think the contract was good between Arnold and the plaintiffs. He knew when he made it that he could not perform it without the signature of his wife to the deed. He, in effect, bound himself to procure such signature. It in nowise differs in this respect from a contract to sell lands which one does not own at the time he makes such contract. The fact that one did not have the legal title at the time he made the contract, and could not procure it afterwards, has never been recognized as a legal defense to an action for breach of the contract."

In *Lawrence* v. *Vinkemulder,* 157 Mich. 294, the contract covered a house and lot, occupied by the defendant as a homestead, worth between eight and nine thousand dollars. Four of the judges of this court were of opinion that the facts of that case brought it within the reasoning of *Dikeman* v. *Arnold, supra,* while four others were of opinion that because the contract did not embrace *lands* in excess of a homestead, *Dikeman* v. *Arnold* did not control. Chief Justice BLAIR there said:

"The case of *Dikeman* v. *Arnold, supra,* is not inconsistent with this conclusion. That case differs from this in that the contract covered lands not embraced within the homestead."

While the case of *Way* v. *Root*, 174 Mich. 413, involved property held by the husband and wife by entireties and therefore is not exactly in point; the opinion distinctly recognizes the authority of *Dikeman* v. *Arnold*, quotes from that opinion with apparent approval, and says:

"An agreement to convey, though invalid to affect the title to real estate, in whole or in part, may yet be valid between the parties as a basis for the recovery of damages by reason of its breach."

I have been unable to find that the law as announced in *Dikeman* v. *Arnold* has ever been overruled, nor is there any reason in equity and good conscience why it should be overruled. So long as the wife is not disturbed in her homestead rights why should not the contracting husband be made to answer for his default in failing to perform his contract?

I concur, however, in a reversal of the case upon the ground that the theory upon which it was submitted to the jury was wholly at variance with the theory of the declaration. I am of opinion that the case should have gone to the jury under instructions as to the measure of damages approved in *Allen* v. *Atkinson*, 21 Mich. 351.

The judgment should be reversed and a new trial ordered, with costs to appellant.

BIRD, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred with BROOKE, J.

LASKOWSKI *v.* PEOPLE'S ICE CO.

1. JUDGMENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — HUSBAND AND WIFE—PERSONAL INJURIES TO WIFE.

   The determination in a suit by a wife for personal injuries that the defendant was negligent, and the plaintiff free from negligence, is not conclusive upon defendant in a suit brought by the husband against the same defendant, for damages arising out of the same circumstances.[1]

2. SAME—CONCLUSIVE AS TO PARTIES ONLY.

   It is the general rule that judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation.

3. DAMAGES—PERSONAL INJURIES TO WIFE—HUSBAND AND WIFE—PECUNIARY DAMAGES—MONEY ADVANCED BY WIFE.

   In an action by the husband for his pecuniary injuries as a result of personal injuries to his wife through the alleged negligence of defendant, he could recover money advanced by the wife upon his promise to reimburse her, paid for medical treatment and other expense in connection with her injuries; such expense not being incurred upon the credit of the wife, or included in her claim for damages against defendant.

4. SAME—GRATUITOUS SERVICES.

   In such action defendant is not liable for gratuitous services rendered to plaintiff and his wife, nor for those rendered by a minor daughter, out of employment and living at home, at least in the absence of a contract to pay her.

5. SAME—TRIAL—INSTRUCTIONS—FUTURE DAMAGES.

   It was error for the court below to refuse to instruct the jury that the plaintiff could not recover for future loss or expense unless the same were proven to a reasonable certainty.

Error to Wayne; Gage, J., presiding. Submitted June 6, 1918. (Docket No. 37.) Decided September 27, 1918.

[1]See note in 10 L. R. A. (N. S.) 140.

Case by John Laskowski against the People's Ice Company for injuries to plaintiff's wife. Judgment for plaintiff. Defendant brings error. Reversed.

Berger & Milburn, for appellant.

Charles T. Wilkins and *Edward R. Kehoe,* for appellee.

Anna Laskowski had judgment against the People's Ice Company for personal injuries caused by a runaway horse owned and used by said People's Ice Company. The judgment was affirmed on appeal. 190 Mich. 331. The plaintiff in the case at bar is the husband of Anna Laskowski, and he brought this action to recover from the People's Ice Company damages for such pecuniary injuries as resulted to him from the injuries to his wife. In his declaration he alleges the facts and circumstances attending the injuries his wife sustained and the resulting injury to himself. A traverse of the matters set up in the declaration puts in issue every fact necessary to be proved to sustain a recovery. The trial proceeded as though all material facts were in issue. The testimony elicited is not substantially different from that given upon the trial of the suit begun by the wife. The cause was submitted to a jury, a verdict for $2,300 was returned for plaintiff, for which sum a judgment was rendered. A new trial was denied. Plaintiff introduced in evidence, without objection, the files and record in the case of *Anna Laskowski* v. *People's Ice Company.* It is stipulated by counsel:

"that neither the files or records, nor copies thereof, in the case of *Anna Laskowski* v. *People's Ice Company* introduced into evidence on the trial of this case need be returned with the bill of exceptions, or record, or printed in the printed record; that it appears from such files and records that the same accident was complained of in the said case of *Anna Laskowski* v. *Peo-*

ple's Ice Company as in the present case of *John Laskowski* v. *People's Ice Company;* that the plaintiff in the former case is the wife of the plaintiff in the latter case and that the defendant was the same in both cases; and that the pleadings and proofs in the case of *Anna Laskowski* v. *People's Ice Company* appear fully in the printed record of the same to the Supreme Court of this State, being now there on file and being case No. 26,960 therein, which was decided March 30th, 1916, and is reported in Vol. 190, Michigan Reports, page 331."

Upon the subject of the negligence of defendant and contributory negligence of Anna Laskowski, the jury was instructed that both points were settled in the suit brought by the wife, and they were told they—

"must find that the defendant ice company was guilty of negligence as charged, and that the plaintiff's wife, Anna Laskowski, was free from contributory negligence. The only questions, therefore, for your consideration, are whether or not the plaintiff has sustained damage, loss and damage, as a proximate result of the injuries to his wife, Anna Laskowski, sustained through the accident; and if you find that he has, then the only remaining question is for you to determine the amount of the damage."

Points raised and discussed are stated by appellant as follows:

"*First.* In charging and instructing the jury that the judgment obtained by Anna Laskowski, the wife of the plaintiff, against this defendant, for her personal damages for injuries received by her in this same accident, was conclusive as to the question of the negligence of the defendant; and that the plaintiff's wife, Anna Laskowski, was free from contributory negligence; that that judgment could not be reviewed; and that the only question for the jury's consideration was whether or not the plaintiff had sustained damage as the proximate result of the injuries to his wife, sustained through this accident, and, if he had, the amount of such damage.

"*Second.* By admitting in evidence certain receipt-

ed bills for medicines and doctors' services, without proof that they were paid by the plaintiff.

"*Third.* In refusing to admit testimony that the bills for medicines and doctors' services were paid by the wife of the plaintiff out of her personal funds.

"*Fourth.* For refusing to strike out, on defendant's motion, certain testimony as to an alleged agreement between the plaintiff and his wife, that the wife was to pay the expenses of her care, and that the plaintiff was to later reimburse her.

"*Fifth.* By charging and instructing the jury that the plaintiff was liable for the expenses for the care of his wife, and entitled to recover therefor, whether paid by him or not, and refusing the defendant's request in this regard.

"*Sixth.* By refusing the defendant's request to instruct the jury that the plaintiff could not recover for services gratuitously rendered him.

"*Seventh.* By admitting certain testimony over the defendant's objection, as to the value of the services rendered by the plaintiff's daughter, and refusing the defendant's request to instruct the jury that the plaintiff was not liable for the services rendered him by his minor daughter.

"*Eighth.* In failing and refusing to charge and instruct the jury that the plaintiff could not recover for future loss or expense unless the same were proven to a reasonable certainty.

"*Ninth.* Because the court erred in failing and refusing to grant the defendant's motion for a new trial, because the verdict is against the great weight of evidence.

"*Tenth.* Because the court erred in failing and refusing to grant the defendant's motion for a new trial, because the verdict is grossly excessive."

OSTRANDER, C. J. (*after stating the facts*). More or less persuasive reasons have been before now advanced in support of the proposition that if a wife recovers a judgment for personal injuries, the determination in her suit that the defendant was negligent, and the plaintiff free from negligence, is conclusive upon defendant in a suit brought by the husband

against the same defendant, for damages arising out of the same circumstances. In *Anderson* v. *Railroad Co.*, 9 Daly (N. Y.), 487, it appeared that plaintiff's infant son had received injuries, and his guardian brought an action for his damages, in which action it was determined, upon the merits, that the injuries arose from the negligence of the defendant. The father, in an action brought to recover for the loss of his son's services on account of the injury, in his complaint set up the facts and circumstances of the injury, and, also, pleaded the action and recovery in behalf of the son. On motion to strike out the allegations as to the former recovery, the court, in denying the motion, said:

"If, in an action brought against the defendants for the son, by his guardian, it has been judicially determined, that the accident which caused the injury was not owing to any negligence on the part of the son, but was due solely to the negligence of the defendants, there is no reason why that question should be tried over again in the action brought for the loss of the son's services, as it would involve an inquiry which has been already made and settled, between the party to whom the accident happened and the defendants. In this action, the plaintiff is limited to the recovery only of such damages as he may have sustained by the loss of his son's services; and I can see no reason why, to establish his cause of action, he should be required to prove that the accident, which deprived him of his son's services, was caused by the defendant's negligence, when that fact has been judicially determined against the defendants in the action brought for the benefit of the son."

In *Brown* v. *Railway Co.*, 96 Mo. App. 164 (70 S. W. 527), the action was brought by the husband for damages for his injuries growing out of personal injuries to his wife. It appeared that the husband and wife, in a joint action, had recovered a final judgment against the defendant for personal injuries to the wife.

Citing and approving *Anderson* v. *Railroad Co., supra,* and *Lindsey* v. *Town of Danville,* 46 Vt. 144, it was said:

"According to the principles to which we have alluded, the judgment in the joint action by the husband and wife against defendant, must be held to be conclusive in this action on every issue determined in that. It sufficiently appears from the record in that case, admitted in evidence, that the issues of negligence and contributory negligence were determined in favor of the plaintiffs. The injury to the wife, for which damages were claimed, was the same in both cases. The issues upon which the right to recover depended were exactly the same in both cases. The plaintiff was a party in that case, as well as this. The defendant was the same in both. Every question of fact that could arise in the present case was determined in that, except as to the kind and *quantum* of damages to which plaintiff was entitled, and the evidence given was ample to support the verdict for such damages. It follows that with the action of the trial court in permitting the plaintiff to introduce in evidence the record of the pleadings and judgment in the case of the plaintiff and his wife against defendant, and in refusing to permit the defendant to introduce any evidence tending to disprove the negligence alleged in the plaintiff's petition and to prove that of plaintiff as alleged in its answer, we can find no fault."

In *Lindsey* v. *Town of Danville, supra,* Judge Redfield delivered the opinion and it was said, among other things:

"The husband and wife, having received final judgment in a joint action against the defendant for personal injuries to the wife occasioned by the negligence of the defendant, the latter is estopped in an action by the husband to recover damages for the loss of the wife's service, etc., to deny the facts put in issue and found against it in the former action."

There are decisions of equity courts, of which *Harmon* v. *Auditor of Public Accounts,* 123 Ill. 122 (13

N. E. 161, 5 Am. St. Rep. 502); *Gallaher* v. *City of Moundsville*, 34 W. Va. 730 (12 S. E. 859, 26 Am. St. Rep. 942), are examples, to the effect that where a number of taxpayers, in behalf of themselves and all other taxpayers, seek to prevent the issue of municipal bonds, the decree sustaining the validity of the issue is binding and a bar to any further litigation, the Illinois supreme court holding that a judgment or decree against a municipal corporation, or its legal representatives, as to the validity of an issue of bonds is binding upon all its citizens though not parties to the suit, citing Freeman on Judgments (3d Ed.), § 178, to the effect:

"A judgment against a county, or its legal representatives, is a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. A judgment for a sum of money rendered against a county imposes an obligation against the citizens which they are compelled to discharge. Every taxpayer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the officers of the county levied and endeavored to collect the tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment nor re-litigate any of the questions which were or which could have been litigated in the original action against the county."

Counsel for appellee cites these cases, as well as *Western Mining & Manfg. Co.* v. *Virginia Cannel Coal Co.*, 10 W. Va. 250, and *Jones* v. *Silver*, 97 Mo. App. 231 (70 S. W. 1109). Only *Anderson* v. *Railroad Co.* is precisely in point, since in the Missouri and Vermont cases the husband, necessarily or otherwise, was in fact a party plaintiff in the suit first begun, and however much respect ought to be paid to the early decisions of the court of common pleas of the city and county of New York, we are referred to no decision of the court of last resort of New York sustain-

ing this decision. Opposed to it are *Neeson* v. *City of Troy*, 29 Hun (N. Y.), 173, and *Groth* v. *Washburn*, 39 Hun (N. Y.), 324, while in *Malsky* v. *Schumacher*, 27 N. Y. Supp. 332, and *Berg* v. *Railroad*, 89 N. Y. Supp. 433, the case of *Anderson* v. *Railroad Co.* is substantially overruled. So, in *Fearn* v. *Ferry Co.*, 143 Pa. 122 (22 Atl. 708, 13 L. R. A. 366), *Walker* v. *City of Philadelphia*, 195 Pa. 168 (45 Atl. 657, 78 Am. St. Rep. 801), *Brierly* v. *Railroad Co.*, 26 R. I. 119 (58 Atl. 451), *Duffee* v. *Railway Co.*, 191 Mass. 563 (77 N. E. 1036), the rule is laid down that in cases like the one at bar the husband is enforcing an independent right, there is no privity between the husband and wife in that respect, and that the judgment in an action brought by one cannot be put in evidence on the trial of an action brought by the other. In Missouri, in *Womach* v. *City of St. Joseph*, 201 Mo. 467 (100 S. W. 443, 10 L. R. A. [N. S.] 140), the question was:

"If a wife sue to recover damages for injuries done by negligence to her body and for the pain of body and anguish of mind flowing therefrom, and if she be cast on trial, does the judgment in her suit, as a matter of law, bar the husband's recovery in his suit against the same defendant for the damages personal to himself and arising out of the same event?"

The opinion of the court is a valuable one, and answers the question in the negative.

Upon principle, the rule laid down by the learned trial judge is plainly wrong. The action of the wife, like the action of this plaintiff, is *in personam*. The right of the wife to bring and control her own action was subject, legally, to no interference on the part of the husband. He was not a necessary or a proper party to her suit. He could neither institute nor control the action in her behalf. The judgment is her

sole property. *Berger* v. *Jacobs*, 21 Mich. 215; *Michigan Cent. R. Co.* v. *Coleman*, 28 Mich. 440; *McCauley* v. *Railway*, 167 Mich. 297. The husband is not privy to the wife, in blood, representation, estate or law. He derived no title to his present demand from or through her. She could not have released it, and had she failed to recover in her action that would not have barred him. It is the general rule that judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation. *Besancon* v. *Brownson*, 39 Mich. 388, 392; *Phillips* v. *Jamieson*, 51 Mich. 153, 154.

As the case must go down for a new trial, some of the other assignments of error will be considered. It appears that considerable expense was involved in the treatment of plaintiff's wife for the injuries she received and was paid for out of her money recovered in her suit against this defendant. There was testimony tending to prove that the husband, the plaintiff in this action, agreed with his wife that if she would pay it he would reimburse her. It does not appear that medical and other assistance was rendered upon the credit of the wife so that she might have included the cost in her own claim for damages in her suit. If the husband had authorized any other person to pay these charges on his account, it would not have been a bar to his recovery for them in this action, and no good reason is perceived for saying that if his wife, upon his request and promise to repay her, paid them he may not now recover them from defendant.

As to services gratuitously rendered to plaintiff and his wife, of course defendant is not liable, nor for those performed by a minor daughter, out of employment and living at home, at least in the absence of a contract to pay her.

The charge of the court upon the subject of future

damages is criticised. The rule stated in *Brininstool* v. *Railways Co.*, 157 Mich. 172, 180, and restated in *Kethledge* v. *City of Petoskey*, 179 Mich. 301, 311, should have been given to the jury.

It is not likely that other questions presented upon the record will arise upon a new trial, and they are not considered.

The judgment is reversed, with costs to appellant, and a new trial granted.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ANDREWS *v.* OSIUS.

1. FRAUD — CORPORATIONS — MISREPRESENTATION OF ASSETS — LIABILITY OF OFFICER.

   A statement of the assets and liabilities of a corporation made to a prospective purchaser of stock of the corporation not authorized by the corporation, signed by defendant, *held*, to be the signature of defendant personally, and not that of the corporation, although he added the words "secretary and treasurer" after his name.

2. SAME—STATUTES—FRAUDS, STATUTE OF.

   Where the stock of the corporation, which was largely a family affair, was practically owned by defendant and his wife, and was controlled by defendant, section 11983, 3 Comp. Laws 1915, providing that no action shall be brought to charge any person by reason of favorable representation concerning the character, credit, etc., of any other person unless such representation be in writing, and signed by the party to be charged thereby, is not applicable.

3. SAME—LIABILITY OF OFFICER.

If, however, it were to be held that said statute did apply, the statements in writing signed by the defendant were a sufficient compliance with its terms, and were personally binding upon defendant.

4. SAME—EVIDENCE—PLEADING—ISSUES.

In an action for fraud and deceit in misrepresenting the assets, liabilities, and business of a corporation to a prospective purchaser of stock of the corporation, where the declaration averred that defendant represented to plaintiff that said company was taking out of the nets on an average 800 pounds of fish per day, but there was no evidence of such representation by defendant, it was error for the court below to admit evidence that the average catch was not over 300 pounds per day, and to submit such question to the jury.

Error to St. Clair; Tappan, J. Submitted June 18, 1918. (Docket No. 52.) Decided September 27, 1918. Rehearing denied January 21, 1919.

Case by Bert Andrews against Charles R. Osius for fraud and deceit. Judgment for plaintiff. Defendant brings error. Reversed.

James A. Muir (*Lincoln Avery*, of counsel), for appellant.

Burt D. Cady (*Walsh & Walsh*, of counsel), for appellee.

STONE, J. This action is based upon alleged fraud and deceit of defendant. The action was begun by writ of *capias ad respondendum*. It is the claim of the plaintiff that early in 1914 he was negotiating with the defendant for the purchase of an interest in a fishing plant at Port Huron, owned by the Consolidated Fisheries, a corporation; that plaintiff lived at Bay City, and had no knowledge of the value of the plant or the amount of business that said corporation was doing; that he had a considerable correspondence with defendant, in which plaintiff asked and called

for a correct and true statement of the property of the corporation, and the true cash value of the items of its property; also the true statement of the debts of the company, including mortgages, and all of its resources, and stated that he did not want to invest money in the business unless such true statement was first furnished him.

The plaintiff also claims that while he was familiar with the business of buying and selling fish, and with the operation of small net fishing for perch and pickerel, he had had no experience in deep water fishing for lake trout and white fish, and that he so informed the defendant. The plaintiff further claims that after he had made said several written requests of the defendant, the latter did on January 28, 1914, give to the plaintiff a detailed type-written statement showing items of property, and their value, and also a statement of the debts of the corporation, and that at the bottom of each of these typewritten statements the defendant wrote, with pen and ink, that the statements were true, signing his name thereto, adding the words "Sec'y and Treas. Consolidated Fisheries, Inc."; that upon receipt of these statements so signed, the plaintiff paid to the defendant the sum of $2,000 and received $2,000 par value of the stock of said corporation; that at the same time and as part of the same transaction and in consideration thereof, the plaintiff became the general manager of the corporation under a written contract with the corporation to that effect; and that he took charge of its business in March, 1914, and continued such management until about September, 1914.

It is the further claim of the plaintiff that from time to time while he was acting as manager, he discovered that the statement of the defendant as to the value of the property was untrue; that the defendant had grossly misrepresented the value of a large part

of the property; that he had concealed from plaintiff the existence of a chattel mortgage upon which there was unpaid upwards of $500 on one of the company's boats; that he had grossly misrepresented the amount of debts of the company; and that he had misrepresented the amount of business which the company had been doing before the plaintiff purchased his stock. Because of these claimed misrepresentations of fact and relying on the same, the plaintiff claims that he was induced to pay $2,000 for stock in a company that soon after became bankrupt, and to enter into said contract, and that because of fraud and deceit on the part of the defendant, as aforesaid, he was entitled to a judgment for the loss of his money, he claiming to have tendered back his stock, and to have made a demand for the money, before bringing this suit. There was testimony tending to prove said claims.

On the part of the defendant it was claimed at the trial, that he, his wife, and one Dr. Ellis had purchased and incorporated the business known as the Consolidated Fisheries; that he had no practical knowledge of the working of the business, but was himself a dentist; that the company needed a man experienced in the business to act as a general manager, and advertised for one; that the plaintiff answered the advertisement and came from Bay City to Port Huron on several occasions before he purchased the stock in question, and examined the property and plant; that he gave plaintiff full information concerning the business, and that plaintiff had full opportunity to examine the boats, seines and all of the physical property of the plant. He claims that he gave the plaintiff a fair "estimated" value of the boats, seines and all the property of the company, and also a full and true statement of the debts and obligations of the company, including the chattel mortgage on the boat, held by the St. Clair County Savings Bank,

which he claimed was included in the statement of the total amount of debts owed by the company. It was also defendant's claim that all of the $2,000 that plaintiff paid for his stock was used for purchasing seines and supplies for the company, and that plaintiff knew this fact; that in addition to this, both the defendant and his wife made further advances of cash, all of which were used for the benefit of the company, with plaintiff's knowledge; that the direct cause of the failure of the company was, in part, a poor season's business, due to natural causes, but largely to the mismanagement of the plaintiff himself, which latter was a controlling cause, which resulted in the company becoming bankrupt, causing the loss of all the money which defendant and his wife invested in the property.

The statement of the values made by defendant to plaintiff, and known as exhibit 7, was as follows: Heading:

"Consolidated Fisheries, Inc., Producers of Lake Huron Fish, Port Huron, Mich. Board of Directors: Chas. R. Ellis, President; M. W. Warrick, Vice President; C. R. Osius, Secretary-Treasurer. 221 Huron Ave. Telephone 87.

" 'Estimates of our assets, January 28th, 1914.

2 tugs	$5,000.00
Steamer Brooks	3,000.00
No. 1 gas tug	2,000.00
(making a total of $5,000.00.)	
2 buildings	500.00
21,000 corks	315.00
5,400 lb. lead	270.00
140 nets	560.00
120 nets	200.00
1 lifter	350.00
1 lifter	100.00
1 lifter	250.00
1 gas engine	50.00
3 platform scales	45.00

150 shipping boxes	$50.00
50 tug boxes	50.00
25 twine boxes	35.00
6 reels	60.00
1 ice crusher	15.00
1 gas tank	7.00
500 lbs. salt fish	25.00
1 oil corker	12.00
1 tanning vat	10.00
Misc. such as tools, cables, anchor ropes, buoy ropes, furniture, printed matter	100.00
	$8,004.00' "

(Then in writing as follows):
"This is a true statement, January 28, 1914.
"C. R. OSIUS, Sec'y and Treas.
"Consolidated Fisheries, Inc."

Another statement relating to the indebtedness of the company, and known as exhibit 8, it was claimed, and testified to by plaintiff, bore the same heading and was signed exactly the same as exhibit 7. It contained names and amounts opposite, nine in number, amounting to $338.38, the last item being "cash in bank $174.26. Bills we are owing" (here follows 25 names and amounts opposite). "Total $1,464.37."

The plaintiff testified that after the receipt of exhibits 7 and 8, he entered into a written agreement with the Consolidated Fisheries; and that, acting upon the representations so made to him by the defendant as to the assets of the corporation, and its liabilities, he invested his money in this company. There was testimony tending to show the value of some of the property to be much less than was represented, and the indebtedness much larger, including a chattel mortgage on one of the boats. By the terms of the agreement between the plaintiff and the corporation it was provided that:

"Said Andrews shall be allowed a separate bank account of two thousand dollars ($2,000) for carrying

on the necessary business of said corporation and shall have authority to sign checks for the same. Should said account be at any time over two thousand dollars ($2,000) said Andrews agrees to turn over all money above said two thousand dollars ($2,000) to the treasurer of said corporation at his request."

This agreement was signed by the plaintiff and Consolidated Fisheries, Inc., by C. R. Osius, secretary and treasurer. It contained the following:

"The undersigned signatures are stockholders of the Consolidated Fisheries, Inc., and the above agreement is approved by them as signed below:

" 'Shares of Stock. Par value $10.00 each.

Stockholders' names.		Common.	Preferred.
M. W. Osius.....	Shares	400	
Chas. R. Ellis.....	Shares	75	
James A. Muir.....	Shares	25	
C. R. Osius.....	Shares	136' "	

It appeared that M. W. Osius and M. W. Warrick were one and the same person, to wit, the wife of defendant. It appeared in evidence that the $2,000 paid by the plaintiff was placed in a bank account to the credit of the plaintiff as manager, but he immediately gave a check to the defendant for $1,000 to be used by the latter for the purchase of supplies, and the paying of indebtedness of the company. It appeared in evidence that the defendant had used some part of said fund to pay on indebtedness where he was personally liable. Upon that subject the defendant testified as follows:

"Stub of 3-16, 1914, to the bank for $34.25 was $25 on a note and $9.25 interest. That was the note secured by chattel mortgage. That was indorsed by me, I think. I believe I indorsed the note collateral to the bill of sale of the tug to the bank. On March 16th after Mr. Andrews went in, the company paid $25 on principal, and $9.25 interest on that note. That check was drawn on a fund wherein the $1,000 I received from Mr. Andrews was deposited."

The declaration averred that the defendant represented to the plaintiff that the said company was enjoying a large and lucrative business, and that it was taking out of the nets on an average of 800 pounds of fish per day. This last item as to the 800 pounds average catch was not testified to by the plaintiff, nor was there any evidence of such a representation by the defendant. The plaintiff's counsel, however, asserted that there was such evidence, and in the course of the testimony of the plaintiff's witness, Max Moore, after he had testified to the values of the buildings, boats, etc., the following occurred:

"*Q.* There has been some proof in this case of representations made by Dr. Osius that the company was having an average catch of fish amounting to 800 pounds a day. Do you know anything about the catch of that company during the year 1913, we will say?

"*Defendant's Counsel:* I object to that; in the first place there is no charge anywhere, except just now out of the mouth of Mr. Walsh that this defendant ever made a statement in writing, or otherwise, that the average catch during the year, or during any particular time was 800 and some odd pounds a day.

"Objection overruled.

"*A.* Yes.

"*Q.* Tell the jury how you happen to know anything about it.

"*A.* Well, they weren't very friendly with the other fishermen—

"*Defendant's Counsel:* There is some more prejudicial stuff of that character, and I move to strike that out as prejudicial.

"*The Court:* It may stand.

"*A.* They wouldn't tell us fishermen what they were catching and it was up to us in our own business to know what they were catching, and the quantities that they were getting of a certain catch. I was fishing the same time, and if I wasn't doing as good as they were, I would move to where I would do better, and if I was doing better than they were I would keep my mouth shut, and keep away from the gang.

"*Defendant's Counsel:* I move to strike that out as hearsay.

"*The Court:* It stands simply as an explanatory basis of his knowledge how he happens to know.

"*A.* I went up there on the track back of my residence and watched them unload their fish and I could see when they threw off boxes. I could guess within a very short amount of what was in that box, not as to the kind, but as to the weight, and I knew from the position of their tug during the time they were lifting, what they were fishing for.

"*Q.* Give the jury your estimate of their average catch per day, during the entire season of 1913?

"*Defendant's Counsel:* I object to that for the reason that this witness is not shown to be competent to testify to that during the period he is now asked.

"*The Court:* He may answer.

"*A.* I wouldn't place their catch to exceed 300 pounds of fish on an average for every day. There were a few days in the spring when their catches ran possibly 800 or 900 pounds, and there were a few days in the summer time, when their catch ran about three fish. That is true of everybody's fishing.

"*Defendant's Counsel:* I ask to have that stricken out as incompetent."

"*The Court:* It may stand.

"*A.* I include all kinds of fish. Perch would be half the value of white fish, and trout would be about two-thirds the value of white fish."

The witness then proceeded to testify as to the value of the different kinds of fish. Similar testimony was received under objection from the witness Selkirk. In its charge to the jury the court then stated as one of the claims of the plaintiff, that the defendant "had misrepresented the amount of the daily average catch of the fish." The court also charged the jury, among other things, as follows:

"You are further instructed that whether the plaintiff exercised ordinary care and prudence in protecting himself from fraud, by ascertaining the character and value of the property in question by means of the inspections he made, is a question of fact for you to

determine. To determine this fact you will take all of the evidence concerning this phase of the case into consideration. If it be your conclusion from the proofs that the defects and lack of value of which he complains, were ascertainable as I have explained it, and his loss is due to his own carelessness, then he cannot recover damages upon this phase of the case. If, however, the inspection he made and the information he had, or his lack of experience in regard to the character and value of property would not be a warning to a man of ordinary prudence that Dr. Osius' statements as to value of property were untrue, then plaintiff had a right to rely upon those statements as being true, and if false, he may recover damages sustained. You are instructed that the principle of law just explained does not apply as to misrepresentations, if any, made by Dr. Osius as to the amount of fish caught, the existence of the chattel mortgage, or the amount of debts of the corporation. These were facts wholly within the knowledge of Dr. Osius, and it was his duty to include in his statement the existence of all obligations of the company. Plaintiff was not bound to ascertain facts concerning these matters. Plaintiff had a right to rely upon such statements, and if you find they were in fact false, and plaintiff relied upon them as being true, then defendant may be held responsible for resulting damage."

It will be noted that one of the boats listed (the steamer Brooks) was valued at $3,000. The defendant himself testified that it was purchased by his wife for $1,500, although the agreement for the purchase was in the name of the company and was for $1,500. The bill of sale, however, was to Mrs. Osius and stated the amount to be $2,500. On January 28, 1914, she transferred the boat to the company "for one dollar and other valuable consideration."

In the record the facts concerning the corporation are somewhat confusing. The original articles do not appear in the record in full. It is claimed that they bore date November 10, 1911. The defendant testified:

"We attended to the work of organizing the company in 1912. I don't think we had an attorney. The articles of association have been produced here. They seem to be dated November 10, 1911, and filed January 27, 1912. The stockholders' names are put in here. M. W. Osius is my wife. Geo. L. Moore, that is Max Moore's brother. He got us into it. Charles R. Ellis, he works in my office, and C. R. Osius, myself. We had a first meeting and elected directors. And the directors elected the officers. We never kept any minutes.

"*Q.* The articles of association show the capital stock $3,000, and the amount subscribed $1,500, how was that $1,500 subscribed?

"*A.* I don't remember that. There never was anything but cash put in for stock. Mr. Moore did not put in any; I loaned him the money personally, and I never got it back. He never got the stock. I kept the stock for security. Mr. Ellis put in $500 in cash, I think. Later on he got his stock. Those were the only people that put any cash in, myself, my wife and Mr. Ellis. I think my wife and I put in $500 that time. The two of us. And I put in another $500 for Mr. Moore."

When asked as to the amount of money his wife had advanced the company, on January 28, 1914, he answered:

"Altogether, from the beginning that must have been three or four thousand dollars, something like that. When you say advanced, she kept buying stock in the concern. I figured out at the time, on January 28, 1914, how much she had advanced to the company. I issued her stock for all she had advanced. I charged her $10 a share for the stock, full price. I handled Mrs. Osius' business matters. This is her money that went into this. Her stock has always remained in my safe. * * * She has about 400 and some shares. * * *

"*Q.* When you took the bill of sale in the name of Mrs. Osius for $2,500, was it your understanding that Mrs. Osius was to be repaid $2,500?

"*A.* She was to take it out in stock; she didn't get any money for it. She took it out in stock of the cor-

poration. We didn't issue her any stock in the beginning; we knew we had it, but we didn't make any division of it. Then when outsiders came in—this was a family affair as we claimed before, our family owned it and friends of ours, and we did not issue any particular stock at that time, but when an outsider came in, we issued all our stock, and Mrs. Osius got $1,500 worth of stock in the concern at par value. Then she conveyed this tug over to the company. That was about January 28, 1914, the very day that Bert Andrews put his money in here."

The plaintiff claimed that under the terms of the agreement he was entitled to one-half of the profits secured on the sale of fish purchased from outsiders, together with two cents a pound on the company's catch, less cost of labor of running the fish house and the cost of the ice used in connection with this branch of the business. He claimed that his portion of these profits was $896, which sum he retained. After the plaintiff severed his connection with the corporation, it was declared a bankrupt, and suit was brought by the trustee in bankruptcy to recover this $896 which the plaintiff had retained. That suit is now in this court. It also appeared that the plaintiff retained $408 of the money of the company, but it appeared that he turned over that sum to the trustee in bankruptcy of said corporation, after this suit was begun. There was evidence tending to show that plaintiff had sold one-half of his stock for $1,500. He testified, however, that he never received any pay for it, and afterwards, and before suit, took it back.

The case was submitted to the jury, and they were finally instructed that if they found that the plaintiff, in the manner claimed, lost any portion of the $2,000 that he paid for his stock, they should fix the amount, and the court added: "Interest will be added from January 28, 1914. This may be done here in open court when you return your verdict." The jury later

returned into court with a verdict for the plaintiff in the sum of $1,000, "to which verdict, the court, then and there, added interest of $116 and directed the entry of said verdict in the sum of $1,116."

A motion having been made for a directed verdict for the defendant at the close of the evidence, and the court having reserved its decision, under the statute, the same was considered on a motion for a judgment for the defendant, notwithstanding the verdict, for many reasons, some of which were the following:

"Section 9518 of the Compiled Laws of 1897 (3 Comp. Laws 1915, § 11983), provides that:

" 'No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.'

"No writing of the character required by said statute was offered or received in evidence on the trial of said cause, which is an action for false representations, claimed to have been made by defendant to plaintiff concerning the character, credit, ability, trade or dealings of the Consolidated Fisheries, and to have been relied upon by the plaintiff to his damage.

"Said defendant never individually gave to plaintiff any signed statement regarding the matters mentioned in the preceding paragraph. * * *

"The statement introduced on said trial by plaintiff was not signed by defendant, and does not purport to cover and include all of the assets, or all of the liabilities of said Consolidated Fisheries. * * *

"Defendant did not reap any reward out of the result of the sale of shares of stock of, in, to and by said Consolidated Fisheries to plaintiff."

This motion was denied, and in denying the same the learned circuit judge said:

"At the close of proofs, and upon motion of defendant for a direction of verdict for defendant on

the ground that the statute of frauds applicable in case of corporations, requires that the individual to be charged with the debt, or promise of another, shall sign such undertaking personally. The contention is, that the written statement as to the property in question, and its value, and which is the basis of fraudulent representations charged, is the statement of the corporation, and not of defendant Osius. At that time the court was impressed with this contention, basing this upon the assumption that the organization, the Fisheries company named in the declaration, must be presumed to be a *bona fide* corporation, and the written statement in question signed by defendant Osius in the name of the corporation should be held to be the signature of the corporation solely. Upon more deliberate consideration of the evidence and the circumstances concerning the organization, I am convinced that it would be improper for the court to set aside the jury's verdict. The entire question as to the character and value of the property in question, and as to the representations of fact concerning the same, made by Osius to Andrews, and all other questions of fact were fully submitted to the jury. They settled these disputed facts in favor of plaintiff. Their verdict should not be disturbed unless it clearly appears there is no legal basis for its support. Upon consideration of the entire record, it is my conclusion that there was no corporation action of the company authorizing Osius to sign the written statement in question, and that in view of his entire course in the matter, the signature to the representations complained of becomes the personal act of the defendant, and not of a corporation."

The learned circuit judge then expressed serious doubts as to the legality of the corporation. Judgment was thereupon entered for the plaintiff. The defendant has brought the case here for review, and there is a large number of assignments of error. By his assignments of error it is obvious that appellant relies mainly upon the statute of frauds above quoted.

It is first contended that the statements were signed by the corporation and not by the defendant person-

ally. We do not agree with this contention. The fact that he added to his signature the words "Sec'y and Treas. Consolidated Fisheries, Inc." does not make it the signature of the corporation as contended. We think that by the undisputed testimony, the signature was intended to be, and was, that of the defendant.

We are of the opinion that the statute of frauds relied upon is not applicable to the instant case. It appeared that the corporation was practically owned by defendant and his wife, and was controlled by defendant. He handled Mrs. Osius' business matters. He had the full management and control of the business and it was a family affair, prior to plaintiff's taking the stock. In the light of this record it may be said that defendant so manipulated the business as to get $2,000 of the plaintiff's money into the corporation, in fact to reimburse himself and wife, and especially to reimburse himself for moneys he had paid out, and with which to pay debts for which he was personally liable, and to put new life into the business.

The following language in *Hess* v. *Culver*, 77 Mich. at page 602 (6 L. R. A. 498), is applicable here:

"The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it."

See, also, *McDonald* v. *Smith*, 139 Mich. 211; *Diel* v. *Kellogg*, 163 Mich. 162, 171; *Hubbard* v. *Oliver*, 173 Mich. 337; *Massey* v. *Luce*, 158 Mich. 128.

In *Massey* v. *Luce*, *supra*, many of the facts were

similar to those in the instant case. Before the time plaintiff put in his money, Mrs. Osius and defendant had advanced moneys, the exact amount of which does not appear. At the time of the transaction, when plaintiff came in, the capital stock was increased, the defendant and wife took new stock for their advances, thereby directly benefiting themselves. This was done as a part of the scheme to get the plaintiff's money into the concern, and to get the contract with him.

If, however, it were to be held that the statute of frauds did apply, the statements in writing signed by the defendant were a sufficient compliance with the terms of the statute, and were personally binding upon the defendant.

We are constrained, however, to reverse the judgment below for the reason that the question as to the 800 pounds average catch of fish per day was submitted to the jury. There was not a scintilla of evidence on the part of the plaintiff that any such representation had ever been made by defendant, either orally, or in writing. Plaintiff's counsel, however, asserting there was such testimony, was permitted, over the objection of defendant's counsel, to offer and put in testimony that the average catch for 1913 had not exceeded 300 pounds per day, and also the value of fish. The court, in its charge, advised the jury that this was one of the claims of the plaintiff, for them to consider, and further advised them that a misrepresentation "as to the amount of fish caught" was an inducement upon which plaintiff had a right to rely, without investigation. In our opinion it was prejudicial error to receive testimony on the subject, and to submit the question to the jury. The subject should not have been gone into, or submitted to the jury at all. It is, on this record, impossible to say what amount of damages, if any, was awarded to the plaintiff upon that subject. The claimed difference

of 500 pounds per day was an item large enough to account for the entire verdict.

As the case must go back for a new trial, it should be said that a careful consideration of the record does not disclose any other prejudicial error. Upon the subject of misrepresentations as to value, attention is called to the cases cited, and what was said in the recent case of *Face* v. *Hall*, 177 Mich. 495, 499.

For the error pointed out the judgment of the circuit court is reversed, and a new trial granted, with costs to the appellant.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

KRUCZKOWSKI v. POLONIA PUBLISHING CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MINORS—HAZARDOUS EMPLOYMENT.

   Under the provisions of section 11, Act No. 285, Pub. Acts 1909, as amended (2 Comp. Laws 1915, § 5332), prohibiting the employment of any male under the age of 18 years in any hazardous employment, where a boy has not attained the age at which he may lawfully be employed in the occupation or work in which he is injured, he cannot be regarded as an employee, within the provisions of the workmen's compensation act.

2. SAME—"EMPLOYEE."

   A valid contract of employment in the work in which the minor was injured is essential in order that such person may be an "employee" under the workmen's compensation act.

See notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

3. STATUTES—MINORS—CHILD LABOR LAWS—MASTER AND SERVANT.
The object of statutes regulating the employment of minors is threefold: To prevent persons of immature judgment from engaging in hazardous occupations; to prevent employment and overwork of children during the period of their mental and physical development; and to prevent, as far as the law is able to prevent it, a competition between weak and underpaid labor and mature men.

4. MASTER AND SERVANT — MINORS — HAZARDOUS EMPLOYMENT — PERSONAL INJURIES—ASSUMPTION OF RISK—FELLOW SERVANT.
Held, that children who are unlawfully set at work in hazardous employments and are injured therein, without fault or negligence on their part, should have the benefit of a common-law action against the wrongdoer, where the defenses of assumption of risk and negligence of a fellow servant are not available to a defendant.

5. SAME—NEGLIGENCE—ASSUMPTION OF RISK—ILLEGAL CONTRACT—STATUTORY DUTY.
Since assumption of risk is the result of a contract of employment, and the employer cannot legally contract to violate a statute, the servant does not assume the risk due to the omission of a statutory duty on the part of the employer.

Error to Wayne; Davis, J., presiding. Submitted June 4, 1918. (Docket No. 11.) Decided September 27, 1918.

Case by Joseph Kruczkowski, an infant, by his next friend, against the Polonia Publishing Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Clark, Emmons, Bryant & Klein, for appellant.

Dohany & Dohany, for appellee.

STONE, J. The sole meritorious question raised and discussed by counsel in this case is whether the plaintiff had a right to bring this action to recover damages for a personal injury, or whether he should have

proceeded under the workmen's compensation act (2 Comp. Laws 1915, § 5423 *et seq.*).

It appeared that at the time of his injury, the plaintiff was 15 years, 8 months, and 5 days old. The injury occurred on February 4, 1915. The plaintiff went to work for the defendant in the month of December, 1914, as an errand or messenger boy, and so continued until the day of the accident, when his work was changed to operating a Gordon press. He had never worked anywhere before he was employed by the defendant. At the time of soliciting employment by the defendant, plaintiff took with him and produced his "working papers" and left them with the defendant. These papers authorized his employment in non-hazardous employment, but said plaintiff was not allowed to be employed in any hazardous employment.

It further appeared that the defendant was a private corporation engaged in the conducting of a printing establishment, and had accepted the provisions of Act No. 10 of the Public Acts of 1912, Extra Session, and had complied with all the provisions thereof, and that said acceptance had been approved by the industrial accident board of this State, and that due notice thereof had been posted in a conspicuous place in the plant or place of work of the defendant, and that the plaintiff had entered the employ of the defendant subsequent to said acceptance, and subsequent to the approval of said acceptance by said board, and subsequent to the said posting of notices thereof; and that at the time of the entering into said contract of hire, as errand or messenger boy, the plaintiff did not notify defendant in writing that he elected *not* to be subject to the provisions of said act. It was therefore claimed by the defendant that the court had no jurisdiction to hear, try and determine the matters and things in the declaration alleged. There was a plea to the jurisdiction of the court, in the nature of a

plea in abatement, and the same matters of defense were also claimed in a notice under the general issue. The plaintiff alleged and testified that he was set at work by the defendant to run a Gordon press, a hazardous employment, without proper instruction, and that while thus at work his right hand was so mangled and injured in the machinery that he suffered the loss of a number of fingers, and a part of the hand, thus rendering the same useless; all without any negligence on his part.

By section 11 of Act No. 285 of the Public Acts of 1909, as amended by Act No. 220, Pub. Acts 1911 (2 Comp. Laws 1915, § 5332), it is provided that no male under the age of 18 years shall be employed in any hazardous employment.

Upon the trial at the close of the plaintiff's case, and again at the close of all of the evidence, the defendant moved the court for a directed verdict upon the ground that, there being evidence of the defendant's compliance with the compensation act, the court had no jurisdiction. These motions were overruled and defendant duly excepted. The questions of defendant's negligence, and whether the employment was a hazardous employment, and whether the plaintiff was guilty of contributory negligence were duly submitted to the jury in a proper charge. At the defendant's request the following special question was also submitted to the jury:

"Was the employment of the plaintiff at the Gordon press, under all the evidence in this case, a hazardous employment within the meaning of section 11 of Act No. 220 of the Public Acts of 1911?"

This question was by the jury answered in the affirmative, and a general verdict for the plaintiff in the sum of $2,500 damages was returned. Thereupon, and within the time allowed, the defendant filed a

motion for judgment notwithstanding the verdict, raising the same question. This motion was denied, and a judgment for the plaintiff in accordance with the verdict was duly entered. The same question was raised in a motion for a new trial, which being denied the defendant duly excepted, and the case is here upon writ of error.

By its assignments of error the same question is presented. Upon the questions of fact involved there was evidence to sustain the verdict, and there is no claim that the verdict was contrary to the weight of the evidence. Appellant calls attention to the following provisions of the compensation act. Section 4 of part 1 (2 Comp. Laws 1915, § 5426) provides that:

"Any employer who has elected with the approval of the industrial accident board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of section one; nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of, or personal injury to any employee, for which death or injury compensation is recoverable under this act, except as to employees who have elected in the manner hereinafter provided *not* to become subject to the provisions of this act."

The position taken by counsel for plaintiff, and held by the trial court was, that plaintiff was not within the operation of the compensation act because he was employed at a hazardous employment, which is prohibited by the statute upon that subject. This raises the question whether a minor legally employed at non-hazardous work, but prohibited by another section of the statute from being employed about dangerous machinery, or at hazardous employment, comes within the operation of the workmen's compensation act. So far as we know there are no adjudicated cases in this State upon this proposition.

Subdivision 2 of section 7 of part 1 of the act (2

Comp. Laws 1915, § 5429) defines employees as follows:

"Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State who, for the purposes of this act, shall be considered the same, and have the same power to contract as adult employees, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

If the plaintiff comes within the purview of this section of the act, obviously he cannot recover in this action. What interpretation should be given the words, "and also including minors who are legally permitted to work under the laws of the State?"

In *Hetzel* v. *Wasson Piston Ring Co.*, 89 N. J. Law, 202 (98 Atl. 308), a minor was employed contrary to law, and in holding that the workmen's compensation act did not apply, but that defendant was liable under the common law, the court used the following language:

"It can hardly be doubted that the legislature, in providing for the engrafting of these statutory provisions on contracts of hiring, had in mind contracts which were valid in law, or, at least, contracts the making of which was not prohibited by express legislative enactment; for it would be entirely unreasonable to attribute to the legislature the intention of adding terms to a contract of hiring which it had already prohibited the parties from making."

Is it not a fair interpretation of the statute to say that the words "minors who are legally permitted to work under the laws of the State," refer to, and mean, the work being performed when the accident occurs, and do not refer to an illegal employment? Section 11, Act No. 220, Pub. Acts 1911, which was on the

statute books at the time the workmen's compensation act was passed, clearly prohibits the employment of a minor 15 years of age in any hazardous employment. Section 10 of the same act permits the employment of minors under 16 years of age at a nonhazardous employment, if the minor has a permit granted by the proper authorities. The employment permit in evidence contains the following:

"Said child is, therefore, hereby granted permission to be employed in accordance with said law."

It is apparent that when his employment was changed from nonhazardous to hazardous work, his employment was contrary to law, and in violation of the permission granted in the employment permit. The law seems to be that where a child has not attained the age at which he may lawfully be employed in the occupation or work in which he is injured, he cannot be regarded as an employee, within the provisions of a compensation act. *Hetzel* v. *Wasson Piston Ring Co., supra; Hillestad* v. *Industrial Ins. Commission*, 80 Wash. 426 (40 Ann. Cas. 1916B, 789, 141 Pac. 913); *Stetz* v. *Mayer Boot & Shoe Co.*, 163 Wis. 151 (156 N. W. 971). But in *Foth* v. *Macomber & Whyte Rope Co.*, 161 Wis. 549 (154 N. W. 369), it was held that the rule did not apply to a minor who was at the time of entering the employer's service, legally authorized to engage in the occupation for which he contracted to work, but was not permitted by law to do the particular work in which he was injured. In our opinion the better rule is that to permit a minor employee to be regarded as within the meaning and provisions of the compensation act, there must be a valid contractual relation, and a contract to be employed in the work in which he was injured; that a contract which is illegal, or in violation of a statute, will not suffice. A valid contract of employment in

the work in which the minor was injured is essential in order that such person may be an "employee" under the act. The statutes regulating the employment of minors, are humane statutes, and their violation is made a misdemeanor. Their object, in part, is the protection of the child. It has been said that the object of such laws is threefold: To prevent persons of immature judgment from engaging in hazardous occupations to their peril; to prevent employment and overwork of children during the period of their mental and physical development, and to prevent, so far as the law is able to prevent it, a competition between weak and underpaid labor and mature men, who owe to society the obligations and duties of citizenship.

We should not lose sight of what is best for the child. The law not only discourages, but prohibits the employment of children in hazardous employments. It is casting no disparagement upon the workmen's compensation law to hold that its provisions were not intended to apply to children who are unlawfully set at work in hazardous employments; and that when they are injured in such employments, without fault or negligence on their part, that they should have the benefit of a common-law action against the wrongdoer, where the defenses of assumption of risk and negligence of a fellow servant are not available to a defendant. Such a holding will, in our opinion, have a tendency to discourage such illegal employment, and be a benefit to the minor.

The following decisions of this court are to the effect that the neglect or violation of a statutory duty by an employer is itself actionable negligence; and that as the assumption of risk is the result of a contract of employment, and the employer cannot legally contract to violate a statute, the servant does not assume the risk due to the omission of a statutory duty on the part of the employer. *Sipes* v. *Michigan Starch*

Co., 137 Mich. 258; *Sterling* v. *Union Carbide Co.*, 142 Mich. 284; *Murphy* v. *Grand Rapids Veneer Works*, 142 Mich. 677; *Swick* v. *Ætna Portland Cement Co.*, 147 Mich. 454.

Upon the subject of the defense of the fault of a fellow servant, and the concurring negligence of the master, see *Syneszewski* v. *Schmidt*, 153 Mich. 438; *Kleinfelt* v. *J. H. Somers Coal Co.*, 156 Mich. 473.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

MOORE *v.* ANDREWS.

1. CONTRACTS—CONSTRUCTION BY PARTIES—QUESTION FOR JURY.
   Where a contract between a corporation and its manager as to compensation for his services was obscure and ambiguous, and it was defendant's claim, supported by evidence, that for several months the contract had been construed by both parties according to his contention, he was entitled to have such question submitted to the jury.

2. SAME—REQUESTS TO CHARGE—INSTRUCTIONS.
   It was error for the court below to refuse defendant's requested instruction that, if the jury should find that in the method of keeping the books and rendering monthly statements to the corporation, the parties adopted a method of construing the contract, the jury should adopt the same method of construing the contract in arriving at a verdict.

3. SAME—TRUSTEE IN BANKRUPTCY.
   Where the trustee in bankruptcy of a corporation, in a suit

against the corporation's former manager, is relying upon a contract which the corporation had a right to make, he is bound by the terms of the contract.

4. TROVER—CONVERSION—MONEY.

An action of trover will lie against the former manager of a bankrupt corporation, at the instance of the trustee in bankruptcy, for money belonging to the corporation which he unlawfully retains, after it has been demanded.

Error to St. Clair; Law, J. Submitted June 18, 1918. (Docket No. 53.) Decided September 27, 1918. Rehearing denied January 21, 1919.

Case by Alex. Moore, trustee in bankruptcy of the Consolidated Fisheries, Incorporated, against Bert Andrews for the conversion of certain money of said corporation. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Burt D. Cady (*Walsh & Walsh,* of counsel), for appellant.

James A. Muir, for appellee.

STONE, J. This is an action on the case, with a count in trover, for the alleged unlawful conversion of the money of the Consolidated Fisheries, a corporation. The plea was the general issue. Before plea there was a demand by the defendant for the particulars of the plaintiff's demand. The bill of particulars filed was for the wrongful conversion of the following sums of money at the times mentioned, viz.:

June 30, 1914	$689.72
July 31, "	121.75
August 25, "	50.92

Upon the trial this bill was amended by adding $34 thereto. On the 28th day of January, 1914, the said corporation, through its authorized officers, entered into a written contract with the defendant which was as follows:

"This agreement made and entered into this 28th day of January, 1914, by and between Bert Andrews of Bay City, Michigan, hereinafter called Andrews, and the Consolidated Fisheries, a Michigan corporation, of Port Huron, Michigan, hereinafter called corporation.

"Witnesseth: That whereas said corporation is desirous of securing a general manager for its business and said Andrews represents himself as capable and experienced in all matters pertaining to the practical management of a commercial fishing establishment and the purchasing and selling of fish, and fish products; now upon those representations it is agreed as follows:

"Said corporation employs said Andrews as general manager, and said Andrews binds and engages himself for such work and agrees not to enter into any other employment, or to become interested in anything of a competitive nature for a period of five years from February 28th, 1914, which day will be the beginning of the term of services.

"Said Andrews agrees to devote all of his time and energy for said five years to further the interest of said corporation and agrees to faithfully account to the proper officers of said corporation, for any and all money and property entrusted to his care or handled by him.

"Said Andrews agrees to make full and true statements to the corporation directors, the first part of each month of the amount of fish, or other business handled during the previous month, and of the price paid and received therefor, and of the labor and services and expenses in detail, in connection with said business, and to keep at the office in the fish house of said corporation proper books of accounts in that respect, which books shall show in detail the affairs of said business as managed by said Andrews, and shall at all reasonable times be accessible to any officer or stockholder of said corporation.

"Said Andrews shall be allowed a separate bank account of two thousand ($2,000.00) dollars for carrying on the necessary business of said corporation and shall have authority to sign checks for same. Should said account be at any time over two thousand

($2,000.00) dollars, said Andrews agrees to turn over all money above said two thousand ($2,000.00) dollars to the treasurer of said corporation at his request.

"Said Andrews shall have for said period of five (5) years the full management of said corporation's business; buying and selling and producing of fish or anything else may be handled in such business, and the full control of its physical properties for said purpose, but he shall consult and counsel with the secretary or treasurer of said corporation so as to be informed of the financial condition of said corporation and of its ability to make purchases of any kind above said two thousand ($2,000.00) dollars, so that such officers may know of the plans and contemplated purchases and expenditures by said Andrews and acquiesce therein or disapprove thereof.

"Instead of salary, said corporation agrees to pay and said Andrews agrees to accept for said five (5) years' services, one-half of the net profits of said corporation during that term, except profits growing out of said corporation's own catch of fish hereinafter referred to. It is agreed, however, by said Andrews and said corporation that said Andrews' commission shall not exceed twenty-five thousand ($25,000.00) dollars, for the five (5) years' services, or, in other words, if said one-half of the net profits due said Andrews should amount to more than the twenty-five thousand ($25,000.00) dollars, during said five (5) years' services, then all in excess of this amount shall revert to and belong to said corporation.

"It is also agreed that while the management of the plant and equipment of business shall be in charge of said Andrews, the catch of fish shall be sold and disposed of in the same manner as purchases by said Andrews as manager and the moneys resulting shall be the property of the corporation, less the sum of two cents per pound, which two cents is that upon which a part of the commission of said Andrews is to be figured. It being further understood the expenses for running said fish house including ice shall be paid out of said two cents and the profits on the purchases and sales of other business outside of said corporation's own catch of fish and the said corporation will pay all other expenses.

"As a part of this contract, said Andrews agrees to purchase at par and pay for in cash to said corporation, on or before February 28, 1914, two thousand ($2,000.00) dollars of the capital stock of said corporation and it is agreed that at the end of said five (5) years, that if this contract be not renewed, that said corporation will repurchase all of said Andrews' stock at par, and said Andrews agrees to sell the same.

"Said corporation agrees that if there are any dividends, they will declare same semi-annually, in June and December.

"And each party hereto agrees to faithfully perform all the promises and undertakings in his or their behalf hereinbefore set up.

"In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals in duplicate the day and year first above written.

"BERT ANDREWS,

"CONSOLIDATED FISHERIES, INC.,

"By C. R. OSIUS, Secretary and Treasurer.

"Signed, sealed and delivered in the presence of JAMES A. MUIR.

"The undersigned signatures are stockholders of the Consolidated Fisheries, Inc., and the above agreement is approved by them as signed below.

Stockholders' names, P. O. Address	Shares of Stock Par Value $10.00 each Common
M. N. OSIUS, Port Huron	400
CHAS. R. ELLIS, Port Huron	75
JAMES A. MUIR, Port Huron	25
C. R. OSIUS, Port Huron	136"

Early in March, 1914, the defendant went into the management of the business and continued until the fall of that year, when the corporation went out of business, and was later adjudicated a bankrupt in the Federal court. Later, the plaintiff herein was appointed trustee in bankruptcy, and this suit was brought claiming that the defendant unlawfully converted the said moneys of the corporation while he

was such general manager, under circumstances which entitled the plaintiff to maintain this action.

The case turns upon the construction that is to be given to the contract above set forth. It was the claim of the plaintiff, which claim was adopted by the trial court, that it was contemplated by the parties when they made the contract that the sole compensation or commission of the defendant was to be one-half of the net profits of the concern, including both its function as a dealer in fish, and its function as a producer or catcher of fish.

In directing a verdict for the plaintiff for the full amount of his claim, as stated above, the court, after reading the paragraphs relating to defendant's compensation, said:

"Now, gentlemen, the language of these two paragraphs of the contract, clearly divide the business of the corporation into two parts, first that of buying fish from other people from third parties, and selling them again. That is the function of dealing in fish. That is one part of the business of this corporation as it is to be managed by Andrews. Another part is fishing, catching fish, producing fish, as the contract says, and selling them.

"Now it appears to the court that the language in the 7th paragraph, that Mr. Andrews shall receive one-half of the net profits of said corporation during the term, is a controlling part of the contract. That is, it is contemplated by the parties, or it was contemplated by the parties, at the time, as appears from the language, that that should be the measure of his compensation. Now, in reference to the fish caught, it gives him two cents a pound upon the fish caught by the corporation, and it says, 'which two cents is that upon which a part of the commission of said Andrews is to be figured.' In other words, I think it is plainly contemplated, or was contemplated by the parties when they made this contract, that the sole profits, or sole commission of Andrews was to be one-half of the net profits of the concern, including

both its function as a dealer in fish, and its function as a producer, or catcher of fish. * * *

"Now, gentlemen, so far as the testimony shows in this case, the department of the corporation which caught fish, lost very heavily. That is, the contract, parts of which the court has read you, does not seem to contemplate there shall be any losses; it was evidently in the minds of the parties at the time they made the contract, that all would be clear sailing, and there would be profits all the time, and no losses. Now, there have been very heavy losses in the department that had to do with catching of fish, or producing of fish. As to whether there have been profits in the department devoted to the buying and selling of fish, is very much a disputed question here. Mr. Andrews rendered monthly statements, and has taken and retained the amount of $896.40, which he claims to be one-half of the net profits made by that part of the business that had to do with the buying and selling of fish. I have no doubt whatever but what Andrews is entirely sincere in this claim; I think he really believes that his system of keeping the books and retaining this money, is exactly in compliance with the terms of the contract, and the contract is somewhat obscure, it is a very difficult contract to construe, but the construction belongs to the court. * * *

"Taking this contract as a whole, under the testimony which has been given quite thoroughly here in court, I cannot see how there are any net profits in the business, one-half of which is to be given to Mr. Andrews. I cannot conceive of any reasonable theory of the construction of this contract, taking into consideration the language of the contract itself, and the circumstances surrounding the making of the contract; I cannot conceive any construction of the contract that would give Mr. Andrews any profits, hence, this $896.40 which he has does not belong to him, but belongs to the creditors of the corporation, who are here represented by the plaintiff."

It appeared in evidence upon the trial that negotiations between the defendant, on the one part, and Dr. Osius, the secretary and treasurer of the corporation,

and Mr. Muir, the attorney of the corporation, on the other part, had been pending for more than a month before the contract was finally signed on January 28, 1914.

At that time Dr. Osius and his wife were the owners of a majority of the stock, and Mr. Muir was the duly authorized attorney of the corporation. The defendant had submitted a draft of contract which did not suit Mr. Muir. On December 26, 1913, Mr. Muir wrote the defendant a letter and apparently either suggested a new draft, or referring to a prior draft of contract, which had been prepared by him. In that letter, among other things, he said:

"They want you to come here as manager, and if you want to come and invest $2,000 in the capital stock, come, and the corporation * * * will see that you are supplied with proper funds for the purchase of fish. It will give you one-half of the net profits of all fish bought from outsiders, and one-half of the net results of two cents per pound on its own catch, with the understanding that you are to have one-half of the net profits during the five years, up to $25,000."

The draft of contract submitted by Mr. Muir contained the following:

"For compensation, the corporation agrees to pay, and said Andrews agrees to accept for said five years' services, one-half the net profits of said corporation during that term, except that growing out of the catch of said corporation, hereinafter referred to, but not to exceed $25,000 during said term, it being understood that one-half said net profits for any year might be less than $5,000 but, if the total net profits during the term hereof, equal the sum of $50,000 said Andrews is to receive one-half thereof, but no more on account of such services. It is also agreed that, while the management of the plant and equipment of business, exclusive of said boats, shall be in the charge of said Andrews, the catch, or product of the catch shall be sold and disposed of, in the same manner as pur-

chases by said Andrews, as manager, and the moneys resulting shall be the property of the corporation, less the sum of two cents per pound, which two cents is that upon which a part of the compensation of said Andrews is to be figured. It being further understood that all expenses of said business, exclusive of running the boats, shall be paid out of said two cents, and the profits on the purchase and sale of other fish outside of the said catch and products of said corporation, and that the corporation will pay to man, fuel, repair, equip for navigation, and run said boats."

This letter and draft of contract were offered in evidence by the defendant "as showing the negotiations leading up to the contract that was really executed." The offer was objected to as immaterial and irrelevant, and the objection was at first sustained. After some discussion the court said, referring to the letter:

"Inasmuch as this is purely a question of construction for the court, in order to allow a record to be made, I will admit this, but I do not think there is any use of reading it to the jury."

And the draft of contract was "received in the same way." The defendant testified:

"I wrote back to him shortly after I received this letter from Mr. Muir. I don't think I received any reply from Mr. Muir to my letter. I had a talk with him the same day the contract was signed, only before it was signed and once before that. And as a result of that conference, the agreement which has been entered into, and offered in evidence, was entered into. I remember a clause in the last paragraph on the second page which says that the 'corporation will pay all other expenses.' * * *

"*Q.* Did you have such a conversation with him after you entered into the contract?

"*A.* On the same day.

"*The Court:* Was that after the contract was signed?

"*A.* Both before and after.

"*The Court:* Whatever talk you had about that clause after the contract was signed, on the same day, you may tell.

"*A.* I wasn't to pay any of the rents, that there was understood, no rents out of that part of it. Just as the contract reads; we talked that over, I wasn't to pay any rent for the fish house part. My salary, instead of salary, was to be commission. They paid the rents and I done the work there.

"*Q.* Was there any discussion as to what should be included in the expenses of the fish house account?

"*A.* Just the running part of the fish house, the men that I hired and he hired. That was talked before and after the contract. The same day, too.

"*Q.* What was the discussion as to what you should charge against the fish house, in the way of expenses?

"Objected to as not competent, and that the parties to whom he was talking had no authority to change or alter the contract.

"*The Court:* To whom were you talking?

"*A.* Dr. Osius.

"*The Court:* Go ahead.

"*A.* I was to pay for the men I had helping to pack up fish. If I didn't have any men, there was no men to pay, and what ice I used I was to pay for."

The defendant also testified that after taking possession, he opened a set of books, the same that had been offered in evidence.

"I entered these books in a double entry system with two accounts, the fish house account, and the corporation account. These books were kept according to that account all the way through, I did not act as manager of the company as the contract provided. I was the manager of the buying and selling of the fish, and supposed to be manager of the other part, but I wasn't. Dr. Osius was the manager of the other part. Dr. Osius ran the part of the business known as the corporation end of it. I ran the fish house end of the business, the buying and selling. I have upon the books of the corporation an account known as the fish house account. I entered upon that account the several items that should be credited to it, and charged

against it the several items that should be charged against it. That account shows a profit, a net profit of somewhere near $1,800. * * * I kept track of all the amounts and reported them to Mr. Muir. I have reported to the corporation all moneys that should be credited to that account, every cent of it, and also all moneys that should be charged against it, and after doing this it showed a net profit of somewhere around $1,800. That is what is known as the fish house account, and that is the part of the business I looked after. The part that Dr. Osius looked after showed a loss. * * * Dr. Osius looked at the books a good many times. I showed him the books. He did not make any comment about the books, except he said they were kept fine. He never objected to anything about the statement he had. He never made any objection to any charges I made on the different accounts. He never made any objections to the items that I put in the different charge accounts. I did furnish a monthly statement of the business transferred there. These eight slips represent the monthly statements. They are fish house statements. I made them out at the dates indicated, and after making them out kept one, and gave one to the doctor. Dr. Osius never objected to those accounts."

The accounts were received in evidence. The defendant then testified at great length to the correctness of these accounts, the result of which showed a net profit, as he testified, of $1,792.81, saying: "I credited the corporation with $896.41 and myself with $896.40, making a total of $1,792.81," being the amount sued for. He further testified that Dr. Osius knew how he was keeping the books, that the doctor got the statements, saw the books and knew what money defendant was drawing, and no objection was made, or question raised. It is undisputed that the only officers or persons representing the corporation, with whom the defendant ever dealt, were Mr. Muir, its attorney, and Dr. Osius, the secretary and treasurer. Mr. Muir was sworn and denied some of the statements of the

defendant, but Dr. Osius was not sworn as a witness at all, on the trial.

Upon the trial it was the claim of the defendant that under the contract, he was to receive in lieu of salary two cents per pound from the sale of the fish caught by the company, and that he was to have one-half of the profits on all fish purchased from outsiders, and that the only expense to be deducted from these sums was the expense for the labor of running the fish house, and cost of the ice used; that the books kept by defendant, and with which Dr. Osius and Mr. Muir were familiar, showed that, as soon as he started the work, he opened a fish house account in which he entered only the fish house expenses and the purchases and sales of fish; that these books were inspected by Dr. Osius and Mr. Muir frequently, and no protest or objection was made as to this division of the money until after the corporation suspended business; and that the course pursued by defendant was consistent with the letter of Mr. Muir, which related to a form of contract substantially like the one finally signed.

It is urged by defendant that the contract when construed in connection with the nature of the business should be held to be as claimed by him, and that it is unreasonable to hold that by the contract it was intended that the defendant should be compelled to work five years before he could claim any compensation for his labor; and then make such compensation dependent upon whether there had been a net profit in the entire business.

Finally it is urged by defendant that if he is not right in the foregoing contention, then oral evidence was admissible to explain portions of the contract which are ambiguous; and that if the contract was construed by the action or conduct of the parties and by defendant making entries showing that he was being given credit for profits in accordance with his

contention, and the officers of the company knew that he was doing this, and made no protest, then this construction would be binding upon the company.

The defendant, after requesting the court to direct a verdict in his behalf, submitted the following requests to charge, in case the requests to direct a verdict were refused.

"3. The contract entered into in this case contains certain provisions as to what Mr. Andrews was to obtain in lieu of salary. These provisions are not clear, and certain doubt remains after reading the contract, as to its proper interpretation. Evidence has been introduced tending to show that Mr. Andrews' method of keeping the corporation's books required to be kept by the contract, and that monthly statements of the business were rendered to Dr. Osius, and that the method of keeping the books and rendering monthly statements was based upon an interpretation of the contract in accordance with the claim of the defendant herein. If you find such evidence to be true, and that the parties to the contract adopted a construction and interpretation thereof, by their actions, then I instruct you that such interpretation should be also adopted by you in rendering your verdict.

"4. If you find that Mr. Andrews' method of keeping the books, required to be kept under the contract, was known to the corporation, and assented to by it, and that he rendered monthly statements to the corporation, as he has testified, which were accepted without question by the corporation, and if you further find that the method of keeping such books, and rendering such statements showed that the parties themselves had adopted a method of construing this contract, as to how his commissions should be figured, then I instruct you that you should adopt the same method of construing the contract, in arriving at your verdict."

Judgment having been entered on the verdict, the defendant has brought the case here, and by proper assignments of error the same questions are raised, as in the requests to charge. Defendant invokes the

following rule, and cites some of the following authorities:

"Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction is entitled to great, if not controlling, weight in determining its proper interpretation." 13 Corpus Juris, p. 546; *Switzer* v. *Manufacturing Co.*, 59 Mich. 488; *Farnsworth* v. *Fraser*, 137 Mich. 296; *Axe* v. *Tolbert*, 179 Mich. 556; *Ardis* v. *Railway Co.*, 200 Mich. 400; *Brown* v. *A. F. Bartlett & Co.*, 201 Mich. 268.

We are of the opinion that there is much force in this claim of the defendant. The contract, in its terms referred to, is obscure and ambiguous. The practical construction of such provisions by the parties was material, and involved a question of fact which should have been submitted to the jury.

We think that the court erred in directing a verdict for the plaintiff, and in refusing to submit the case to the jury, and in refusing to give defendant's third and fourth requests to charge.

But it is urged by the plaintiff, and appears to have been held by the trial court, that the rule above stated cannot apply here, because the action is brought by the trustee in bankruptcy. Upon this record the trustee is suing in right of the bankrupt, relying upon the contract of the corporation. The question is, What was that contract? We think that the corporation had the right to make the contract as claimed by the defendant. See authorities cited in *Courtney* v. *Youngs*, 202 Mich. 384.

It is also urged by the defendant that the court erred in entering a judgment in trover. If it shall, however, turn out that the money taken by the defendant was the money of the corporation at all times, as claimed by the plaintiff, the same having been demanded, we are of the opinion that trover would lie for its conversion. *Hogue* v. *Wells*, 180 Mich. 19;

Reed v. *McCready*, 170 Mich. 532; *Pierce* v. *Underwood*, 103 Mich. 62; *Bearss* v. *Preston*, 66 Mich. 11.

Mistake, or ignorance, or even belief that the money belonged to a defendant "does not constitute a defense in trover." *Tidey* v. *Kent Circuit Judge*, 179 Mich. 580, 586.

For the error pointed out the judgment of the court below is reversed and a new trial granted, with costs to the appellant.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

BRADFORD & CO. *v.* BAXTER.

1. ATTACHMENT — FRAUDULENT CONVEYANCES — IDENTITY OF PROPERTY—DESCRIPTION—AMENDMENTS.

   On a bill in aid of execution to set aside a deed of certain lots as in fraud of creditors, an objection that the property sought to be attached was not properly described is without merit, where it appears that the description was the same as in the conveyances to defendants, that there is no question as to the identity of the property, and the plaintiff was, on an *ex parte* hearing of motion to amend, granted an order permitting the sheriff who served the writ of attachment to amend his return as to the description of the property levied upon.

2. SAME—AMENDMENTS—EX PARTE.

   Amendments are permissible in attachment proceedings on *ex parte* application.

3. SAME—UNDIVIDED INTEREST—TITLE TO PROPERTY.

   A bill in aid of execution will lie as to the undivided two-thirds interest in the attached property standing in the

name of defendant, but not as to the undivided one-third in the name of a third party.

4. SAME—FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.
Evidence that at the time of defendant's marriage the wife had considerable property in her own right, that she loaned money to the husband in consideration of which the attached property was deeded to her, *held*, sufficient to sustain the decree of the court below dismissing the bill.

Appeal from Kent; Lamb, J., presiding. Submitted June 14, 1918. (Docket No. 20.) Decided September 27, 1918.

Bill in aid of execution by Bradford & Company against Frank C. Baxter and another to set aside a deed. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Cady & Andrews, for plaintiff.

Frank J. Powers, for defendants.

STONE, J. The bill of complaint herein was filed in aid of execution, to set aside a deed executed by defendant Frank C. Baxter to his wife, Sadie S. Baxter, bearing date January 17, 1914. It appears from the record that growing out of a contract entered into between the plaintiff and defendant Frank C. Baxter, dated March 21, 1913, the latter became and was indebted to the plaintiff, and that on May 31, 1916, in the circuit court for the county of Kent, the plaintiff recovered a judgment against the said defendant Frank C. Baxter, in a suit in attachment, in the sum of $5,816.72 damages and costs taxed at $63.80.

At the time of the commencement of the attachment suit on December 22, 1915, the defendants were both nonresidents of this State, and the writ was served by attaching the following real estate in the city of Grand Rapids, county of Kent, viz., lot 19 and

the south 15 feet in width of lot 20, in block 6 of Wenham's addition to said city, and there was no personal service of the writ, but the required notice of attachment was given and proof filed therein, and there was no appearance in said attachment suit by the defendant therein, and judgment was taken by default.

After the entry of judgment, the issuing of execution thereon, and the levying thereof on the real estate attached, as shown by the certificate of levy under attachment, the plaintiff was, on an *ex parte* hearing of motion to amend, granted an order permitting the sheriff who served the writ of attachment to amend his return as to the description of property upon which the attachment was levied to read as follows:

"Lot 19 and the south 15 feet in width of lot 20, in block 6 of Wenham's subdivision of blocks 3 and 6, city of Grand Rapids, Kent county, Michigan."

At the time of the attachment aforesaid the title of record to the property described in the certificate of levy under attachment was in defendant Sadie S. Baxter, and had been continuously since January 17, 1914, and she had become possessed of said title on that date by virtue of the said deed of that date executed by said defendant Frank C. Baxter. Levy of execution on the property in question was made on July 29, 1916, and the bill herein in aid thereof, was filed September 12, 1916.

It appeared that the defendants were married to each other in June, 1911, and that prior to said marriage the defendant Sadie S. Baxter had been an actress, had received a good salary, and had accumulated a considerable sum of money, and it was undisputed that at the time of said marriage she was worth upwards of $10,000.

The plaintiff was a manufacturer of pennants and novelties at St. Joseph, Michigan, and the defendant

Frank C. Baxter was a dealer in advertising novelties, and the contract between the parties related to the sale of a large quantity of pennants. The learned circuit judge, who heard the case at the circuit, filed a written opinion, which is returned with the record, and from it we quote as follows:

"At the time the indebtedness from Frank C. Baxter to Bradford & Company, in the spring of 1913, accrued, and for some months prior thereto, defendant Sadie S. Baxter was a good-faith creditor of defendant Frank C. Baxter, and she so continued to be, and was such on the 17th day of January, 1914; and on the 17th day of January, 1914, the amount which the said Frank C. Baxter was indebted to said Sadie S. Baxter was reasonably commensurate with the value of the real estate in question herein; that while I am satisfied from the testimony that Frank C. Baxter intended to, and did what he could to delay and thwart the collection of any claim that the plaintiff may have against him, yet I am not satisfied from the proofs that defendant Sadie S. Baxter had any knowledge of just what Frank C. Baxter was doing, or what his intentions were in that regard. Sadie S. Baxter, being a creditor of Frank C. Baxter, at the time of the transfer, he was acting within his legal right in giving her the preference, without regard to his motive and without regard to the result. Sadie S. Baxter, being a creditor in an amount reasonably commensurate with the value of the real estate transferred, to avoid the conveyance the burden is on the plaintiff upon the whole case to establish, as a fact, that both grantor and grantee are guilty of the fraud complained of. In my judgment the burden has not been sustained."

In a supplemental opinion, referring to the sentence, "the burden is on the plaintiff, upon the whole case to establish," etc., the circuit judge said:

"What the court meant by the use of said expression is no more than this: That in the judgment of the court, the defendants had met the *prima facie* case of the plaintiff as to any connection of Sadie S. Baxter with the alleged fraud, by the greater weight

of the proofs, and that then the burden shifted to the plaintiff, and it had not sustained that burden, upon the case taken as a whole."

Some of the salient facts in the case should be stated. The paternal grandmother of Frank C. Baxter originally owned 19 lots on Burton avenue in Grand Rapids, and also the property in question located on Division street, and known as the Wenham's addition property. Under the grandmother's will the father of Frank C. Baxter had a life estate in this property. He died in 1909, and the said property came to Frank C. Baxter and his two brothers, Don and Solon, each having an undivided one-third interest therein. In July, 1911, Don had a third interest in the property in question, and also a third interest in the 19 lots. Frank C. had an equal interest in the same property. Solon, the other brother, had a third interest in the property in question, but no interest in the 19 lots, he having sold the same to his mother. Prior to 1911, Don had lived in the East and had been in the employ of Frank C. In 1910, Don became afflicted with tuberculosis and later came to Grand Rapids.

The defendants soon after their marriage, and in July, 1911, came to Grand Rapids where they found Don in bad physical and pecuniary condition. It was the claim of the defendants, and they testified, that desiring to aid Don, it was so arranged that defendant Sadie S. advanced $2,300 with which to purchase Don's interest in the property, it being understood that the interest should be conveyed to Sadie S. Instead of taking the deed in her name, Frank C. took the deed in his own name, but he claimed that he held it for Sadie S. They further testified that in August, 1912, defendant Sadie S. loaned to Frank C. Baxter $3,000 for which he was to deed to her his interest in the property. On July 9, 1913, defendant Frank C. Bax-

ter filed a bill against Solon for partition of the property in question. The bill was prepared and signed by his solicitor. It was therein stated that he owned at that time a two-thirds interest in the property, "that no person or persons other than your orator and the said Solon W. Baxter, Jr., have any interest or title to said lands or any part thereof, in possession, remainder, reversion or otherwise." Later, the date not appearing, Sadie S. Baxter was made a party complainant to the bill for partition, and she became the purchaser at a circuit court commissioner's sale, of Solon's interest, paying $1,500, an allowance being made of $446 on account of rent while the premises had been in the occupancy of Solon. This deed ran directly to her from the commissioner, and the sale appears to have been made on May 29, 1915.

Defendant Sadie S. was the owner of a valuable home in the city of Brooklyn, N. Y., when she married Frank C., upon which there was a considerable mortgage. It was the claim of both defendants that it was agreed between them that Frank C. should pay rent to Sadie S. for the use of her home at the rate of $65 a month, but that no rent had ever been paid. On January 12, 1914, the defendant Frank C. Baxter confessed two judgments in favor of defendant Sadie S. Baxter in the supreme court of New York, New York county, one in the sum of $2,200 said to be for money loaned in 1911 and 1913, and the other for the sum of $2,015 for rent of said home of Sadie S. Baxter. In her testimony the defendant Sadie S. Baxter appeared to have little knowledge or information relative to said judgments; but claimed that the matter had been attended to by her New York attorney, who advised such course. Five days after the entry of such judgments the deed of January 17, 1914, was executed by defendant Frank C. Baxter to her of the property in question, and the 19 lots. She claimed that while the

judgments had not been discharged or satisfied of record, they really were satisfied and paid by said conveyance. She made no claim to the 19 lots, and testified that she had no knowledge relating to said lots and did not know that they were included in her deed. Those lots were afterwards sold by defendant Frank C. and the proceeds used in the payment of a debt to his mother, and also in payment of alimony due the trustee of his former wife. The 19 lots are not here in question. A decree having been entered dismissing the bill of complaint with costs to the defendants, the plaintiff has appealed. Some objections to the jurisdiction of the court in the attachment case should be referred to. It is urged by defendant that the judgment was of no validity because the property sought to be attached was not properly described, and that the court had no power to grant the amendment which was ordered. It is of course elementary, that in such a case only the property attached can be levied upon and sold. (Section 13053, 3 Comp. Laws 1915.)

It should be stated that in the deed from Frank C. to Sadie S. as well as in the report of the commissioner, and in the deed from the circuit court commissioner to Sadie S. Baxter, the property was described in the same language as in the attachment levy. The primary object of a description is to identify the property. There seems to have been no question of the identity of the property. By the defendants in their answer and testimony the property is referred to in different ways: as the Wenham avenue property, as 412-414 Division avenue property, all said to be the same property that was in Wenham's addition. It is stated by plaintiff's counsel that there is but one lot 19 and but one lot 20 in Wenham's addition. The most that can be said from this record is that the contrary does not appear. Our statute of amendments is very broad. (Sections 12478-12481, 3 Comp. Laws 1915.)

It has been held that the statute of amendments applies to attachment proceedings. *Barber* v. *Smith*, 41 Mich. 138, 145. Amendments have been allowed in attachment proceedings on *ex parte* application. *Kidd* v. *Dougherty*, 59 Mich. 240. We think that the objection is without merit.

It is also urged that as the property attached did not stand in the name of Frank C. Baxter the judgment is a nullity. It will be noted that as to the undivided two-thirds of the property in question the title had been in Frank C. Baxter. As to the undivided one-third the title had never been in his name, but went direct from Solon, by the circuit court commissioner to Sadie S. Baxter. Our statute provides that:

"All the real estate of any debtor * * * including lands fraudulently conveyed with intent to defeat, delay, or defraud his creditors * * * may be levied upon and sold on execution," etc. (Sec. 12897, 3 Comp. Laws 1915.)

As to the undivided two-thirds interest the point is not well taken. As to the undivided one-third, a bill in aid of execution would not lie. *Archer* v. *Laidlaw*, 129 Mich. 198; *Hackett* v. *Kenning*, 170 Mich. 583. See, also, *Bliss* v. *Tyler*, 159 Mich. 502, where the title to the lands attached had never been held by Tyler.

Upon the merits of the case the plaintiff's counsel strenuously insist that there was a conspiracy on the part of both defendants to defeat the claim of the plaintiff. There is much criticism of the testimony of the defendants as to the claimed bank deposits of Sadie S. Baxter and of the methods of proving them, in the use of memoranda, etc. We think, however, that there was competent evidence that Sadie S. was possessed of money and that it was deposited in banks, as claimed. One may testify that he is the owner of personal property without producing the bill of sale. Plaintiff

urges that it was improbable that Sadie S. Baxter had money in bank, while she was paying interest on a mortgage on her home. It is further urged that if any money was paid by Sadie S. to Frank C. it was a gift. It is true that in some instances Sadie S. used the expression that she "gave" Frank C. the money. Yet in the same connection she testified what was to be done by Frank C. and how the loans were to be paid. It is very evident that she was not a business woman, and was ignorant as to business methods. We are aware of the rule that in such cases the testimony of husband and wife should receive careful scrutiny. It is true that no charge was entered upon any book, either as to the loans or the rent. What was said in *Ullman* v. *Thomas*, 126 Mich. 61, at page 66, is appropriate here:

"True it is that the business was not conducted with the same care and business prudence that would be expected between business men or strangers; but it is not more unusual than is frequently found where the relation between the parties is that of husband and wife, and where the wife trusts the husband, so far as her business affairs are concerned; and, so far as she is concerned, it must be held that the transaction was an honest one, by which she intended to secure the payment and satisfaction of her debt, and did not intend to hinder, delay, or defraud the creditors of her husband."

The testimony was taken in open court, and the trial court had an opportunity to see the witnesses, and to judge of their appearance and fairness. That court has passed upon this testimony, accepting the theory and claim of the defendants, and we cannot upon this record say that the court below erred in believing that the defendant Sadie S. Baxter was a good-faith creditor of Frank C. Baxter. The language of Justice BROOKE in *Smith* v. *Tolman*, 166 Mich. 651, 653, is in point here.

After a careful consideration of the entire record, we have concluded, though with some hesitation, that the conclusion reached by the court below was correct. Its decree will be affirmed, with costs to the defendants.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred with STONE, J.

OSTRANDER, C. J. In my opinion, *Bliss* v. *Tyler*, 159 Mich. 502, denies the validity of the judgment in attachment, for which additional reason I concur in affirming the decree.

LUMBERT *v.* PRINCE.

1. TRIAL—CONDUCT OF COUNSEL—APPEAL AND ERROR—PREJUDICIAL ERROR.

   In an action for personal injuries, for defendants' counsel, on cross-examination of plaintiff's witness, to suddenly change the subject and ask, "What relation are you to this fellow (plaintiff), anyway?" and on the reply, "Not any," exclaim "Good for you," and dismiss the witness, was prejudicial error which was not cured by the admonition of the court not to take such remark seriously.

2. SAME.

   For defendants' counsel to exclaim, on plaintiff's reply to a question, "What a liar you are!" was highly prejudicial and was not cured by an admonition by the court to the jury to pay no attention to such remarks, especially as counsel exclaimed further, "For a man to sit there and tell me that!" which was tolerated without further reprimand.

See notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

3. SAME—MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —EMPLOYERS NOT OPERATING UNDER THE ACT—DEFENSES—INSTRUCTIONS.

In an action for personal injuries by a servant against his employer, who was not operating under the workmen's compensation act, the defenses of assumption of risk and contributory negligence not being available (2 Comp. Laws 1915, § 5423), it was error for the court below to instruct the jury that plaintiff must bear the consequences of all ordinary risks incident to his employment, although he had previously instructed them in accordance with the law.

4. SAME—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, where the negligence charged was that the place where the plaintiff was required to work was rendered unsafe by and in connection with the unsafe condition of the equipment and machinery, an instruction that "defendants were under no legal obligation to provide a guard, screen, or cover for this buzz-saw, if there was sufficient room to carry on the work with ordinary safety," was erroneous, since the work was done in the open and the question of sufficient room was not involved.

Error to Eaton; Smith, J. Submitted June 12, 1918. (Docket No. 95.) Decided September 27, 1918.

Case by Claude J. Lumbert against Cyrus Prince and another for personal injuries. Judgment for defendants. Plaintiff brings error. Reversed.

W. J. Carbaugh and *W. A. Norton,* for appellant.

Frank A. Dean and *Elmer N. Peters,* for appellees.

STEERE, J. In the fall of 1916 plaintiff was injured while in defendants' employ at a portable sawmill located on their premises, engaged in sawing into lumber some logs cut from their land. The portable mill had connected with it a slab- or buzz-saw attachment and plaintiff's work was to cut up the slabs for wood as they came from the logs which were being

sawed into lumber. The buzz-saw was so connected with the power appliances of the mill that it ran continuously whenever the machinery of the mill was in motion, whether in use or not. At an interval during which a log was being placed upon the carriage of the mill for sawing and the engine running with the buzz-saw in motion but not in use, plaintiff proceeded to clear away the saw-dust and other waste material accumulated around and under the saw at which he worked. While so engaged he slipped in such manner, as he testified, that his right hand came upon the swing table or platform of the unguarded slab saw and was swung into it, resulting in loss of its index and middle fingers with their metacarpal bones, permanently disabling and mutilating that member.

Defendants had not elected to come under the workmen's compensation act, and plaintiff eventually brought this action in the circuit court of Eaton county to recover damages for injuries sustained in that accident, imputing the same to defendants' negligence. The trial in that court resulted in verdict and judgment for defendants, to review which plaintiff has removed the case to this court on various assignments of error, of which those directed against portions of the charge and prejudicial conduct of defendants' counsel are most seriously urged.

Plaintiff's declaration charged negligence in failure of defendants to provide him a safe place in which to work, or reasonable safe appliances and machinery with which to do the work for which he was employed; that the buzz-saw rig attachment of the portable mill was "a mere contrivance fixed up for the occasion," not properly constructed or safe-guarded as customary with those in common use, not equipped with a cover to guard the saw or any device to hold the table from swinging when the saw was running but not sawing, etc.

Defendants pleaded the general issue, with special notice of settlement, assumption of risk and negligence on the part of plaintiff. During the progress of the trial defendants were allowed to amend their notice to the effect that they did not own or control the "machinery connected with the buzz-saw," at which it was not disputed they had employed plaintiff to work, and then introduced testimony that a contractor was sawing their logs for a price per thousand feet.

Under the issue raised by the pleadings conflicting evidence was introduced by the parties fairly presenting questions of fact as to defendants' alleged negligence and their claim of settlement. The testimony was largely directed to those two contentions. Several witnesses who had owned and operated portable sawmills were called as experts by each side. Their conflicting testimony fairly supported the claims of the respective parties calling them as to the safe or unsafe condition, construction and manner of operating this buzz-saw according to approved and commonly adopted equipment and methods in that line of business. In concluding his cross-examination upon this subject of one of plaintiff's witnesses with over 15 years' experience in operating portable mills, who testified the saw should be guarded and under the exposed condition shown the place provided for plaintiff to work was "dangerous and unsafe," defendants' counsel suddenly changed the subject and asked, "What relation are you to this fellow, anyway?" being answered, "Not any," he exclaimed, "Good for you, that is all." Upon plaintiff's counsel objecting to this reflection as intended to prejudice the jury the court replied, "I think the jury will not take that very serious." The more serious impropriety of this nature arose as follows: Plaintiff had signed a receipt to defendants for their payment of "Doctor bill, hospital expense and wages for four weeks," amounting to

$98, which concluded, "To cover damages in accident for loss of fingers." He claimed to have been misled into signing so far as the concluding portion was concerned, supposing it only a receipt for the items stated which defendants had assumed or paid. In his cross-examination as to a time when he was in the office of defendants' counsel the following occurred:

"*Q.* There was a man with you?
"*A.* Yes, sir, he told me you sent for me to come up there.
"*Q.* That I sent for you?
"*A.* Yes, sir.
"*Counsel:* What a liar you are!"

Upon exception and objection to such treatment of plaintiff while a witness as prejudicial to his case, the court, without reprimanding counsel, said to the jury, "Of course, gentlemen, you are supposed to give no attention to a remark of that kind; sometimes remarks come when we can't avoid it," which defendants' counsel supplemented by the exclamation—"For a man to sit there and tell me that!" As there is no testimony to the contrary, the turpitude of the witness in testifying that a man who admittedly accompanied him to counsel's office had told him before they went that counsel had sent for him to come up there is only indicated in this record by the assertion of counsel that the witness was a liar and his expressed astonishment, in furtherance of the court's unfortunate intimation that calling the witness a liar was, under the circumstances, irresistible and in the category of remarks which sometimes come "when we can't avoid them," illustrated by counsel's concluding expression of emotion which was tolerated without reprimand. The prejudicial effect of counsel's conduct certainly was not relieved by the court's caution to the jury.

The defense quite apparently stressed during the

trial not only freedom from negligence on the part of defendants, which was a legitimate defense, but the claims which had been pleaded that plaintiff assumed the risk and was himself negligent—defenses now denied to employers not operating under the workmen's compensation law which provides as to them (section 1, part 1, 2 Comp. Laws 1915, § 5423) that:

"In an action to recover damages for personal injury sustained by an employee in the course of his employment * * * it shall not be a defense:

"(*a*) That the employee was negligent, unless and except it shall appear that such negligence was wilful;

"(*b*) That the injury was caused by the negligence of a fellow employee;

"(*c*) That the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances."

While the court early in the charge correctly advised the jury of these provisions as applicable in the case, later in the charge they were instructed without subsequent modification or explanation, as follows:

"I instruct you that a servant, in this case the plaintiff, must bear the consequences of all ordinary risks incident to his employment including that from machinery with which he was working."

This was the last authoritative utterance of the court on the subject, and it cannot be said from the general tenor of the charge considered in its entirety in the light of the pleadings and proofs that its inconsistencies were not misleading. Assuming that the jury had clearly in mind the two contradictory instructions, which one they adopted if either is but conjecture, with a possible inference that it was the last given. Under the reasonable assumption that in the minds of the jury these contradictory instructions off-

set each other, then the jury were uninstructed upon that important subject and plaintiff was deprived of the benefit of the instruction to which the workmen's compensation act entitled him.

The jury were also instructed that:

"Defendants were under no legal obligation to provide a guard, screen or cover for this buzz-saw, if there was sufficient room to carry on the work with ordinary safety."

As the portable mill was operated in the open the question of sufficient room to carry on his work was not involved. Were that the test this instruction applied to the undisputed evidence effectually put plaintiff out of court. The negligence charged, however, was not failure to furnish ample room in which to work, but that the place where plaintiff had to be to do his work was rendered unsafe by and in connection with the unsafe condition of the equipment and machinery at and with which he was required to work.

For the foregoing errors the case is reversed, with costs, and a retrial granted.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SMITH *v.* CIGARMAKERS' INTERNATIONAL UNION OF AMERICA.

1. INSURANCE—LIFE INSURANCE—MUTUAL BENEFIT ASSOCIATIONS —CONSTRUCTION OF CONTRACT.

   A contract of insurance, prepared by a mutual benefit association in accordance with its constitution, is to be most strongly construed against it.

2. SAME.

   Where such constitution recognized that the death benefit might be disposed of by will, *held*, to authorize the construction that it might be regarded as an asset of insured's estate, although otherwise not technically such.

3. SAME—POWERS—STATUTES.

   Under 3 Comp. Laws, §§ 11592, 11593, relating to and abolishing all powers except those authorized by statute, the technical rule relative to the exercise of a power by will is not, in Michigan, controlling; so where the constitution of a mutual benefit association authorized a member to appoint his beneficiary by will, and by his will he left all of his property to his daughter, his sole heir at law, without specifically designating her as beneficiary of the death benefit, it not appearing that he had appointed any other beneficiary, *held*, to be an exercise of the right, the will otherwise being purposeless.[1]

Error to Washtenaw; Kinne, J. Submitted June 6, 1918. (Docket No. 61.) Decided September 27, 1918.

Assumpsit by Hattie E. Smith against the Cigarmakers' International Union of America for the amount of a benefit certificate. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

William H. Murray, for appellant.

A. J. Sawyer and *H. A. Balser*, for appellee.

[1]See note in 42 L. R. A. (N. S.) 1161.

STEERE, J. Aaron Long, by occupation a cigar maker, died at the city of Ann Arbor in the home of plaintiff, his only daughter, on June 23, 1915, being then over 72 years of age. He left a will dated September 21, 1914, making plaintiff his sole beneficiary. At the time of his death he was a member in good standing of the defendant Cigarmakers' Union and had so been since 1885. The constitution of this union contains an insurance feature in the form of death benefits to its members in good standing at the time of their demise, increased by stages for duration of membership. Fifty dollars is provided for funeral or cremation expenses on the death of any member, and including this, that—

"there shall be paid on the death of a member the following sums, viz., if the decedent shall have been a member continuously for five years or longer period less than ten years next preceding his death the sum of $200. * * * If the decedent shall have been such member continuously for 15 years or longer period next preceding his death the sum of $550."

Plaintiff, as sole beneficiary under deceased's will, made seasonable application to defendant, with proper proof of death, relationship, etc., for payment of the amount provided for a member in good standing for 15 years or longer preceding his death, which was refused and this suit commenced. The $50 provided for funeral expenses was paid after commencement of the suit, leaving the amount claimed by her and in litigation $500, which defendant declined to pay on various grounds, but mainly because plaintiff was not specifically designated in her father's will as beneficiary of his death benefit. Upon trial of the case by jury a verdict was directed for defendant on the ground that deceased had not properly, in compliance with the constitution of defendant, designated any person to whom his death benefit should be paid.

Plaintiff's nine assignments of error involve but the main meritorious question of whether Aaron Long as a matter of law designated appellant in his will as the beneficiary of his death benefit, to which he was entitled as a member of the defendant union; and, if not, whether under the facts shown the question of intent should have been submitted to the jury as bearing upon the construction of his will.

Deceased lost his wife not long before he executed this will. Following her death he called upon the president and secretary of defendant's local lodge at Ann Arbor and talked with them in relation to his death benefit, after which he had prepared and executed his will which, aside from formal matter—provision for payment of his debts and the appointment of his daughter as executrix—is as follows:

"*Second*, I give, devise and bequeath to my only surviving child, Hattie E. Smith, of Ann Arbor city, Michigan, all property of which I may die possessed, real, personal or mixed, or which I may be entitled to at the time of my death, she, the said Hattie E. Smith, to have and to hold full title thereto all except what may be required to fulfill the first mentioned item (payment of debts and funeral expenses) of this my last will and testament which I have this day made by reason of the recent death of my beloved wife, Mary J. Long."

Upon the subject of death benefits, section 144*c* of defendant's constitution provides as follows, so far as material:

"A member may at any time designate the person or persons to whom his death benefit shall be paid. Such designation shall be in writing, signed by such member and witnessed by the secretary of the local union * * * and such member may at any time thereafter in like manner change such designation. If there be no such designation, or if the paper making such designation be not deposited with the president of the International Union within 30 days after

the death of such member, such benefit shall be paid to the widow of such deceased member; if there be no widow, then to the minor children of such deceased member; if there be no widow and no minor children of such deceased member, then to any relatives of the deceased member, who at the time of his death were dependent for support in whole or in part upon such deceased member. If there be no written designation produced and deposited, as above required, no widow, no minor children, nor such dependent relative of such deceased member, or if no application in writing as hereinafter provided for the payment of such death benefit shall be made within one year next after the death of such member, then all right and claim of any and every person to such death benefit shall wholly cease and determine. This application shall state (proof of death, etc.). * * *

"In case the designation of the beneficiary of any such death benefit is made by a will the original of which is required by law to be filed in court, a certified or sworn copy of such will in lieu of the original may be deposited." * * *

It is undisputed that, acting under the last quoted provision, plaintiff made application through the proper channels for the death benefit, furnishing a proper certificate of death, probation of the will, a certified copy of the same showing that the original was required by law to be filed in the probate court. And no question as to time or manner of application for payment of benefit is raised, defendant's denial of liability being squarely planted upon the proposition that deceased's personal rights as a member of the union in the benefit fund were merely a power to appoint or designate, and change, the beneficiary or beneficiaries during his lifetime in the prescribed form specified in his contract of membership, evidenced by the constitution of the order and that he failed to exercise that right, its counsel stating in their brief:

"An examination of the will shows that as a matter of fact the will does not designate a beneficiary of the

death benefit because the death benefit is not mentioned, * * * The exact question is whether words disposing of testator's property, 'real, personal or mixed,' disposed of this benefit." * * *

Deceased's will was duly admitted to probate on July 9, 1915, in the probate court of Washtenaw county. The inventory and appraisal of his estate shows real and personal property valued at approximately $5,000, consisting of $4,000 worth of real estate, $606.12 in bank, $57 pension check and a bill for some furniture sold. The benefit right in question was not inventoried or appraised and no reference to it appears in the records of probation.

It is pointed out by the defense that this benefit right under deceased's contract of membership in the union was no part of his estate, but to him only a power of designation, and urged for that reason, with citation of sustaining decisions from other jurisdictions, that the bare bequest of his entire estate to plaintiff does not entitle her to the death benefit accruing under his membership, as it is not a part of his estate. The decisions cited are chiefly based on the recognized general rule that in respect to the execution of a power by will there should be reference to the subject of it, or to the power itself, except in those cases where the will would otherwise be inoperative and the intention to execute the power becomes clearly manifest. Relying upon those decisions and invoking the technical rule relating to powers, defendant points out that deceased's will does not mention any power or subject to which it relates, or express any intention in relation to it, while he had other property upon which the will operated. This view was adopted by the trial court, and a verdict directed for defendant, followed by judgment thereon.

Not claiming as a strict proposition of law that this death benefit was a part of deceased's estate, it

is contended for plaintiff that it was a right in relation to property which he was authorized to confer upon a designated beneficiary in prescribed manner during his lifetime; that he was authorized to do so by will, as though it were part of his estate although technically not such; that plaintiff was his sole heir under the law of inheritance, rendering a will unnecessary and for all practical purposes inoperative except to exercise by it the authority, or power, given him by his membership contract to designate her as the beneficiary of the death benefit, which the language used in it and attending circumstances clearly indicate was his intent; and urging further that the general rule as to powers relied upon by defendant is not recognized in this State as of controlling application to death benefits provided for by mutual associations, or unions, of this nature under the ruling in *Aveling* v. *Masonic Aid Ass'n*, 72 Mich. 7 (1 L. R. A. 528). In that case the defendant association had issued a certificate of insurance to Robert Aveling payable upon his death to his devisees, or, if no will, to his heirs at law. He left a will disposing of certain described real estate, and "all other property of which I shall die seised, real, personal and mixed, and expressly all money in (certain banks), all bonds and notes and stocks to Richard Aveling," his brother, nowhere in said will making reference to the insurance, or death benefit certificate, he held from defendant. The will was admitted to probate in Wayne county and plaintiff, having been appointed his administrator *cum testamento annexo*, demanded of defendant the sum due on the certificate. This was refused because the will made no mention of the insurance, the right to which under the certificate did not "depend upon the accident of being named in the will as devisee of something else, but that it confers upon the insured a power of appointment, under and by

virtue of which he may designate in his will the devisee or devisees of his insurance," and not being a part of his estate it was not included in a general devise of deceased's personal property. Of this contention the court there said:

"While, technically speaking, the decedent may not have died seised of this insurance, we are satisfied that he intended to pass his insurance as well as all his other property to the plaintiff."

The logic of this conclusion necessarily is that, while not technically and as a general proposition of law a part of deceased's estate, under his special relations with defendant and its character the contract prepared by it ostensibly for his protection should be construed, between the parties, as authorizing him to treat it as an asset of his estate when disposing of it by will. In the instant case the intent is much more manifest, from the instrument itself which makes no mention of any specific items or kinds of testator's property to the possibly implied exclusion of others, and from the fact plaintiff was both his sole heir and only devisee.

This will was purposeless and could accomplish nothing in respect to deceased's evident desire to leave his daughter everything he owned or had a right in relation to, except as it served to confer on her his death benefit. He stated in the will itself that his reason for making it was the recent death of his wife who, if she survived him, would have been the beneficiary under defendant's constitution had he made no designation by will or otherwise. He bethought himself of his benefit for which he had been paying dues for nearly 30 years and shortly before he made the will talked upon the subject with the secretary of defendant's local lodge. Eliminating from consideration all testimony as to this secretary's admissions of what advice he gave deceased, which his denial makes an

issue of fact, and striking out questioned testimony of plaintiff as to what her father showed and told her, which was objected to, we are well satisfied from the unquestioned and undisputed evidence that deceased intended to designate plaintiff in his will as the beneficiary of his death benefit, and believed he had done so.

In *Catholic Benefit Ass'n* v. *Priest*, 46 Mich. 429, where the rules of the association provided that a death benefit should be paid "to the person or persons as named by deceased and entered by his order on the will book," with the right reserved to change the same, a question arose over the right of deceased to change by an ordinary will a previous disposition entered in the will book. Recognizing that this beneficiary fund did not technically become a part of deceased's estate, or subject to his debts, the court nevertheless held that the will must govern in so far as it named the persons and amounts, saying:

"Very clear and binding provisions must be shown to deprive a person of the right given him by the laws of the land to dispose of such a fund by his last will."

Deceased's right in this death benefit required at least 15 years' faithful membership with payment of dues, which must be continued thereafter as long as he lived in order to retain such right. His contract with defendant as to the disposition of it after his death is embodied in defendant's constitution, prepared by, or for it, and any obscure provisions are to be most strongly construed against the maker. In the section relating to designation of beneficiaries, it supplementally recognizes in general terms that such designation may be made by will, an instrument in writing popularly and in law recognized as the legal direction or expression of the testator's wishes as to the disposition of his property and property rights, real, personal or mixed, after his death. In view of

the relations of the contracting parties, the subject-matter and assumed character of this benefit association, it does no violence to the language used to construe this authority to designate the beneficiary by will as meaning that, between the parties, for the particular purpose of designation and distribution, the provided death benefit, in its nature personal property, may be included with and regarded as an asset of the member's estate, although otherwise not technically such.

The technical rule relative to exercise of a power by will, as evolved in the complicated development of that subject, is not in this State imperatively controlling in the disposition of a life benefit of this nature, in its attributes purely personal property. Even at common law the recognized exercise of that power, through the medium of the statute of uses, relates primarily and almost exclusively to real estate, while in this jurisdiction all powers except as authorized by statute are abolished (section 11592, 3 Comp. Laws 1915) and:

"A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." Section 11593, 3 Comp. Laws 1915.

While it is not to be claimed this statute wipes the word "power" from our legal vocabulary with all its varied meanings which lexicographers have accumulated, even in proceedings relating to personal property, it at least frees the word from the magic of bewildering technicalities with which the common law has invested it and renders less significant here the decisions in other jurisdictions which recognize the full force of common-law powers and apply them to personal property rights.

Under the unquestioned facts and circumstances of this case and the provisions of deceased's contract with defendant authorizing him in general terms to appoint his beneficiary by will, and it not appearing that he had appointed any other beneficiary, we are satisfied that he intended to and did exercise that right within the meaning of their agreement as fairly interpreted, and by this will has designated plaintiff as such beneficiary. A verdict should have been directed for plaintiff.

The judgment is therefore reversed, with costs, and a new trial granted.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PONTIAC, OXFORD & NORTHERN RAILROAD CO. *v.* MICHIGAN RAILROAD COMMISSION.

1. CARRIERS—SWITCHING CHARGES—FREIGHT RATES.
   Where the relation of railroads is one of co-operation merely, they are entitled to have sustained a joint rate and a reasonable charge for switching service.

2. SAME—ORDERS OF MICHIGAN RAILROAD COMMISSION.
   The corporate organization and affairs of the Pontiac, Oxford & Northern Railroad Company being controlled by the Grand Trunk Western Railway Company, although the independent organization of the first named road was maintained, they must be regarded as identical for the purpose of rate making, so that switching charges between them were properly eliminated by order of the Michigan railroad commission.[1]

Appeal from Ingham; Collingwood, J. Submitted

[1]See note in L. R. A. 1918A, 164.

October 11, 1917. (Docket No. 5.) Decided September 28, 1918.

Bill by the Pontiac, Oxford & Northern Railroad Company and others against the Michigan railroad commission and J. T. Wylie & Company and others, interveners, to review an order establishing freight rates. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

L. C. Stanley (*Geer, Williams & Martin,* of counsel), for plaintiffs.

Alex. J. Groesbeck, Attorney General (*David H. Crowley,* of counsel), for defendant commission.

BIRD, J. J. T. Wylie & Company, manufacturers of certain forest products, together with other companies similarly engaged, filed their petition with the Michigan railroad commission complaining of certain tariff rates on such products in force on the several lines of railway in Michigan which go to make up what is known as the Grand Trunk Railway System, and praying for a reduction thereof. A hearing followed, testimony was taken and a conclusion reached by the commission that the rates complained of were too high, unreasonable and out of proportion to the rates charged by other railroads for similar service, and a reduction of the line rate was ordered and switching charges as between themselves were altogether eliminated.

Conceiving themselves aggrieved at the order of the commission they filed a bill in equity to review it. On review in this court the contentions of plaintiff have been narrowed to the following:

(1) The Pontiac, Oxford & Northern is a separate and distinct railroad company for the purpose of rate making, notwithstanding the fact that its stock is substantially all owned by or held in trust for the Grand

Trunk Western; it is proper for the plaintiff and appellant to treat the former company as not a part of the Grand Trunk Railway System, but whether it is so treated or not is immaterial for rate making purposes, that system being merely a trade-name for certain railroad companies having interests more or less in common.

(2) The switching charges scheduled in the tariffs of the Pontiac, Oxford & Northern and the Grand Trunk Western as between their respective roads are proper and legal, and it was beyond the power of the Michigan railroad commission to order the elimination of such charges.

Plaintiff contends that the provision of the Michigan railroad commission's order that the Pontiac, Oxford & Northern and the Grand Trunk Western eliminate all switching charges between themselves, was and is legally unwarranted, wholly beyond any power vested in the commission, and that it is unjust, unreasonable and confiscatory as requiring said railroad companies to perform switching services wholly without remuneration. Further that the commission considered the aggregate sum of the line rate and the switching charges, whereas it should have considered these items separately.

Defendant meets this contention by the claim that the stock of the Pontiac, Oxford & Northern Railroad Company is owned by the Grand Trunk Western Railway Company and is operated and controlled by it and for the purpose of rate making it should be considered a part of the Grand Trunk Western.

1. If plaintiffs are right in their contention that the relations of the Pontiac, Oxford & Northern and the Grand Trunk Western Railway Company are one of co-operation merely, they are entitled to have sustained a joint rate and a reasonable charge for switching service. On the other hand, if defendant's con-

tention is the proper one, neither road would be entitled to make a charge for switching services, and the order of the commission should be affirmed.

In order to determine which contention should prevail it will be necessary to consider at some length what the relations are between the Grand Trunk Western and the Pontiac, Oxford & Northern.

It appears from the record that the Grand Trunk Railway Company of Canada has secured control of several Michigan railroads and operates them in connection with its own under the trade-name of the "Grand Trunk Railway System." Both the Grand Trunk Western and the Pontiac, Oxford & Northern, the railroads directly involved in this controversy, are a part of that system. The Pontiac, Oxford & Northern is a railway wholly within the State of Michigan extending from the city of Pontiac to Caseville, something over 100 miles. It connects and exchanges traffic with the Grand Trunk Western at Imlay City and with the Detroit, Grand Haven & Milwaukee, another line controlled by the Grand Trunk, at Pontiac. In 1909, the entire capital stock of the Pontiac, Oxford & Northern was purchased by the Grand Trunk Western, and immediately thereafter announcement was made of the purchase by Mr. Chas. M. Hayes, president of all railroads constituting the Grand Trunk System. The announcement was in the following form:

"Grand Trunk Railway System,
"Grand Trunk Western Railway:
"DETROIT, MICHIGAN, December 1, 1909.

"The Pontiac, Oxford & Northern Railroad has passed under the control of this company. The jurisdiction of all officers of the respective departments of this company is hereby extended to that railway, effective December 1, 1909.

"CHAS. M. HAYES,
"President."

Since that date the Pontiac, Oxford & Northern has been operated as a part of the Grand Trunk Railway System. The general officers of the Grand Trunk Western have been the general officers of the Pontiac, Oxford & Northern. The officers of the Grand Trunk Railway Company of Canada have looked after and paid its taxes, done its financing and absorbed its losses or deficits, and the road has been treated in the same way that it would have been had the Grand Trunk Western owned its assets. At the hearing Mr. George W. Alexander, secretary of the Pontiac, Oxford & Northern and the Grand Trunk Western, testified, upon cross-examination, as follows:

"*Q.* As a matter of fact, inasmuch as it is a losing proposition that the Grand Trunk has, because of its general interest, assumed the losses, the proposition of having independent existence is merely a matter of bookkeeping, isn't it?

"*A.* It is run in the same way as it would if owned by the Grand Trunk Western, the losses that accrue they pay. They assumed the bonds and to keep it away from the bond holders they have to pay its debts.

"*Q.* It comes down merely to the proposition of difference in bookkeeping?

"*A.* The result would be the same."

The Pontiac, Oxford & Northern Railroad, however, maintains an independent organization. It is assessed separately by the State, makes reports to the State and maintains its own roadbed and equipment and has its own employees.

But the attorney general argues that notwithstanding these independent features the road is absolutely controlled and managed by the Grand Trunk Western, that the will of the Grand Trunk Western is the will of the Pontiac, Oxford & Northern, and that this control under the authorities creates a relation which justifies the commission in considering the Pontiac, Oxford & Northern as a part of the Grand Trunk

Western for the purposes of rate making. This contention appears to be supported by two recent cases, one of which has been reviewed by the Federal Supreme Court. *State* v. *Railway Co.*, 133 Minn. 413 (158 N. W. 627); *Minneapolis Civic & Commerce Ass'n* v. *Railway Co.*, 134 Minn. 169 (158 N. W. 817).

In the case first cited the question discussed is whether the Chicago & Northwestern Railway Company was entitled to maintain a joint rate with the Chicago, St. Paul, Minneapolis & Omaha Railway Company. It was shown that the Northwestern owned nearly 51 per cent. of the stock of the Omaha and that the officers and directors were the same, and that the Omaha was operated as a part of the Northwestern system. The Omaha, however, maintained a separate organization, maintained its own roadbed and equipment and had separate employees.

In the last case cited the Chicago, Milwaukee & St. Paul Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway each owned one-half of the stock of a terminal railroad serving certain industries in the city of Minneapolis. The terminal railway maintained a separate organization but its officers were either those of the owning companies or friendly to those companies. The terminal company was used by the Milwaukee and the Omaha in connection with their lines of railway on the same terms. The question arose as to whether the terminal, under these circumstances, was entitled to maintain a switching charge for carload freight either delivered to or received from the Milwaukee and Omaha lines. The questions discussed in these cases are similar to the one involved in this case, and in each one it was urged by the stockholding companies that ownership alone of capital stock in one corporation by another does not create an identity of corporate interests between the two companies, or render the stockholding com-

pany the owner of the property of the other. To this proposition the following cases were cited, which are also cited in plaintiff's brief in this case: *Pullman's Palace Car Co.* v. *Railway Co.*, 115 U. S. 587 (6 Sup. Ct. 194); *Peterson* v. *Railway Co.*, 205 U. S. 364 (27 Sup. Ct. 513); *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 (29 Sup. Ct. 527); *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98 (30 Sup. Ct. 66); *United States* v. *Railroad Co.*, 238 U. S. 516 (35 Sup. Ct. 873).

Afterwards, on review of the Milwaukee case against the terminal company in the Supreme Court of the United States (247 U. S. 490 [38 Sup. Ct. 553]), the same argument was made and the same authorities cited. In disposing of this contention Mr. Justice CLARKE said in part:

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. (*United States* v. *Railroad Co.*, 220 U. S. 257 [31 Sup. Ct. 387]; *United States* v. *Railroad Co.*, *supra*). In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

The rule which appears to be established by these cases is that where the corporate organization and affairs of one railroad company are controlled and dominated by another railroad company through ownership of stock or lease, the roads must be regarded as identical for the purpose of rate making.

The relations of the Northwestern Railway Company and the Omaha Railway Company, and the relations of the Milwaukee and Omaha companies with the terminal company are substantially the relations of the Grand Trunk Western and the Pontiac, Oxford & Northern Railroad Company. While it is true that the Pontiac, Oxford & Northern maintains a separate corporate organization, that organization is controlled and dominated by the Grand Trunk Western, and in turn its organization is controlled by the Grand Trunk Railway Company of Canada, which owns or leases, directly or indirectly, all the lines which make up the Grand Trunk Railway System.

We are of the opinion that the relations of these railroads as shown by the record justified the railroad commission in considering them as identical for the purpose of rate making.

The order of the commission will be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred. FELLOWS, J., did not sit.

ABBOTT v. ABBOTT.

1. DIVORCE—EXTREME CRUELTY—CONDONATION—EVIDENCE.
   Although plaintiff had condoned defendant's act in communicating to her a venereal disease, and was thereby estopped from reviving the cause in the absence of subsequent misconduct, nevertheless it was an element competent for the court to consider in weighing their conflicting testimony as to her health and defendant's subse-

See notes in 4 L. R. A. (N. S.) 909; 5 L. R. A. (N. S.) 729; 44 L. R. A. (N. S.) 1003.

quent dissolute tendencies, neglect and loss of affection, and association with women of questionable reputation, supporting the decree of divorce on the ground of extreme cruelty.

2. SAME—ALIMONY—LIEN.

An allowance of $5 per week as alimony, the same being made a lien on defendant's real estate, including a lot standing in their joint names as tenants by the entireties, which by the decree was to vest in and be the sole property of defendant on compliance therewith, he being a young man in robust health and earning $15 a week, *held*, not excessive.

3. SAME—MODIFICATION OF DECREE—DEFAULT.

While it may be questionable whether it is for the best interest of either party to hold unproductive property tied up indefinitely, and a modification of the decree might be advisable on a proper showing of compliance therewith, defendant is in no position to move therein while in default.

Appeal from Kalamazoo; Weimer, J. Submitted April 24, 1918. (Docket No. 68.) Decided September 28, 1918.

Bill by Grace Abbott against Charles A. Abbott for a divorce. From a decree for plaintiff, defendant appeals. Affirmed.

Harry C. Howard, for plaintiff.

Alfred S. Frost, for defendant.

STEERE, J. On September 16, 1916, plaintiff filed a bill for divorce against defendant in the circuit court of Kalamazoo county charging extreme cruelty and on March 15, 1917, obtained a decree in accordance with the prayer of her bill. The parties to this suit were married on November 21, 1907, in Kalamazoo, Michigan, residing there during their married life together, and separated permanently on September 4, 1916, he going to Detroit where he has since

lived. When they were married she was 23 years of age and he over 21. He was then an electric car conductor, and she living with her parents. No children were born to them. For the first five years of their married life they made their home with her parents he paying rent for their rooms and his own board when there, while she helped her mother in the household and no charge was made for her board. He at times ran upon an interurban line and would then necessarily be away from home nights a portion of the time. In company with other employees of the road he had apartments in Albion, one of the cities on the interurban line, and apparently began a course of fast living which ultimately led to his arrest under a charge of embezzlement and conviction on his plea of guilty, which terminated his career as a railroad employee. He then engaged in the grocery business in Kalamazoo and they set up housekeeping by themselves. He ran a small grocery with indifferent success for about two years and a half, after which he followed jitney driving until he left for Detroit.

Just what means, if any, defendant had at the time they were married is in dispute and not made clear, but when they separated he owned in his own name a lot in Kalamazoo valued at $400, a cottage and lot at a resort nearby on Crooked Lake, valued at $700, standing in his name, but in which he claimed, and plaintiff denied, that his father owned a half interest, and a lot in Kalamazoo valued at $600 standing in both their names as owners by entirety. She had in her possession household effects partly purchased by him and partly given by her parents worth from two to three hundred dollars, and something over $150 of old grocery bills due him from the time he was in that business, of which she claims she was able to collect only between $11 and $12. He claimed to have been in debt about $150 when he left Kalamazoo.

She charges in her bill as grounds of divorce that during their married life he commenced a course of "unkind, harsh, cruel and brutal conduct" consisting of neglect, infidelity, and unkind words and acts when they were together, asserting in harsh language he was not going to longer live with her, etc., until she was finally compelled to and did separate from him in consequence thereof on the 4th day of September, 1916; that in his general conduct he was untrue to his marriage vows, associated with women of doubtful character against her protest, to which he would reply it was "none of her business"; and as a result of his conduct in that regard he contracted and communicated to her a venereal disease which caused her great humiliation, suffering and annoyance, seriously impairing her health.

He filed an answer, with cross-bill asking that a divorce be granted him, denying her charges, except the communication of a venereal disease which he claims was condoned, and charged as ground for the relief asked by him unseemly conduct on her part towards other men, and extreme cruelty in extravagance, idleness, failure to properly care for their home, refusal to live with him, and the fact that she took advantage of a visit by him to Kalamazoo for the purpose of seeing and persuading her to go to Detroit and live with him, to serve papers upon him in her divorce suit, of which she had given him no previous intimation.

It seems evident both from the pleadings and proofs in this case that reconciliation is past possibility. Some carefully worded correspondence between them after he went to Detroit, touching her joining and living with him there, savors too strongly of sparring between them for legal position to call for serious consideration. Both parties ask a decree of divorce, the minor question, at least with defendant, being to which

of them it should be granted, with his major grievance the amount of alimony awarded to her.

The issues are in the main purely of fact, and each of the parties impresses us as testifying in the extreme to the bad qualities of the other. To detail the volume of accusing testimony this record furnishes would be an unwholesome and useless thing, serving no beneficial purpose, but we fully agree with the trial court that defendant has failed to make a case for divorce in his favor against plaintiff, whose good reputation and character in the community appears to be well sustained.

It is urged for defendant as a legal proposition that the communication of a venereal disease to plaintiff, which is not denied by defendant, was condoned through her continuing to live with him in marital relations for some years after she knew the fact, authorities being cited which tend to sustain the general proposition. This standing alone might present a serious question; but the drift of the testimony as a whole tends strongly to show that the wreck of their married relations and resultant estrangement was his inclination to lead a fast life and predilection for women of doubtful morality, as to which her credulity and confidence in him made deception on his part easy until finally his conduct became such that her faith in his rectitude and marital fidelity was shattered, particularly after he engaged in jitney driving.

Plaintiff became afflicted and discovered she had contracted a venereal disease from him about two years after they were married. With and in consequence of this she suffered greatly and ultimately was compelled to undergo a serious surgical operation. She testified that he admitted his condition and the result to her, but claimed he had contracted the disease in the use of a public convenience and was sinless and, until convinced to the contrary, she believed

that they were equally innocent victims of circumstances over which they had no control, suffering together in mutual sympathy. His version is that he had contracted the malady before he was married, and, having undergone five or six months' treatment, was, as he supposed, entirely cured, but it came on him again about the time she developed the same condition, and although he never told her before they were married that he was so afflicted he did so later, but not with the excusing particulars she claimed.

If she, with full understanding of the true facts, forgave the wrong he had done her, accepted the situation, and elected to continue the marriage relations for several years thereafter, it may be conceded that, in the absence of any subsequent misconduct on his part giving new ground for divorce, she might be estopped from reviving the cause she had thus understandingly condoned, but here she claims to have been persuaded by him that he had done no intentional wrong and they alike were innocent sufferers; that, believing him blameless, she accepted their misfortune as he represented it and only continued to live with him until subsequently undeceived, although her health was permanently impaired as a consequence of what then befell her. Her mother testified that defendant at first claimed to be suffering with a laceration of the bladder, but afterwards admitted his true condition and excused it as the return of a pre-nuptial affliction of which he supposed he was cured before marriage; that plaintiff refused to believe he was to blame, felt sorry for him and continued to live with him until their final separation, "because she thought so much of him, you could not make her believe he was to blame."

Rejecting this episode in their domestic relations as a sole or distinct legal ground of divorce because condoned, it nevertheless was at least an element in their

married life competent for the court to consider in weighing their conflicting testimony as to her health and defendant's subsequent dissolute tendencies, neglect and loss of affection for his wronged wife, and charged association with women of questionable reputation. There is abundant competent testimony in the case which, if true, and we are impressed that it is, supports the decree granting a divorce to plaintiff on the ground of extreme cruelty.

The court awarded costs to plaintiff, including an attorney fee of $75 and $18.50 expenses of suit, with alimony in the sum of $5 per week, the same being made a lien on his real estate, including the lot standing in their joint names as tenants by entirety, as to which the decree provides that the title shall, "if said sums are promptly paid, vest in and be the sole property of defendant."

A petition was filed by defendant for modification of the decree as to alimony, which was denied and of which the court said in part:

"The defendant complains of the provisions by the terms of which alimony should be made payable at regular intervals for an indefinite period, and urges upon the court the propriety of an order requiring the defendant to pay a lump sum in lieu of alimony, or a division of the property.

"The defendant is comparatively a young man, in the vigor of life, strong and alert physically and mentally and capable of making a good livelihood for himself.

"The plaintiff is not in robust health and her condition I am satisfied is due, to some extent at least, to a loathsome disease transmitted to her by the defendant.

"The separation of these parties is the result of serious misconduct on the part of the defendant. The plaintiff has just cause for complaint of serious wrongs. She is entitled to substantial aid from him as long as she may be in need of it, in my opinion.

"The property is not of such a character or value

that any division could be made that would admit of that provision for plaintiff to which she is entitled."

We are not prepared to hold this award excessive under conditions shown. It is not unusual to make such charges a lien upon a defendant's real estate. Defendant was earning about $15 a week at the time of the decree and has failed to comply with its requirements. By reason of such unexcused default he is not in an advantageous position to move its modification. It is true, as he contends, that without some modification, no matter what or how promptly he pays, he cannot release the property from the continuing lien for alimony imposed, dispose of or raise money on it even to pay the alimony, nor obtain any benefit from the provision relative to the lot in their joint names eventually becoming his sole property. It may be questionable whether it is for the best interests of either party to hold this unproductive real estate with accumulating taxes thus tied up indefinitely. It would seem possible, if not probable, that a modification of the decree in that particular might be advisable, on a proper showing of compliance with its requirements up to the time of application; but as the case now stands, with defendant in default, we are not prepared to disturb the decree of the trial court.

It will stand affirmed, with costs to plaintiff.

OSTRANDER, C. J., and MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. BIRD, J., did not sit.

DEAL v. SNYDER.

AUTOMOBILES — CONTRIBUTORY NEGLIGENCE — NEGLIGENCE — HIGHWAYS AND STREETS—MOTOR VEHICLE LAW.

Where plaintiff alighted from an automobile standing slightly to the west of the center of the traveled track, and started to the east to cross the road without looking, when he was struck and injured by defendant's automobile which approached from the south, he was guilty of contributory negligence precluding recovery, although defendant was concededly negligent in violating the statute by passing to the right of the standing car.

Error to Eaton; Smith, J. Submitted April 17, 1918. (Docket No. 105.) Decided September 28, 1918.

Case by John H. Deal against Walter Snyder for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

Rosslyn L. Sowers and *Elmer N. Peters*, for appellant.

Frank A. Dean and *Claude J. Marshall*, for appellee.

BIRD, J. In the summer of 1916 plaintiff was employed as a farm laborer on the farm of John Locke, in the township of Benton, Eaton county. The farm lies along the east side of a north and south "State reward" highway. Plaintiff resided in the tenant house about 60 rods south of the Locke dwelling and barns. In returning to his work after dinner on July 17th he rode with a Mr. Murray, a neighbor who was driving an automobile of the roadster type. When they arrived opposite Mr. Locke's barns Murray stopped the car a little to the west of the center of the traveled track and plaintiff got out on the right

See notes in 38 L. R. A. (N. S.) 491; 42 L. R. A. (N. S.) 1183.

side where he had been riding. After closing the door he took a step or two toward the east when he was run into, knocked down and run over by defendant's automobile which approached from the south and passed the Murray car on the right side, with the result that plaintiff was severely injured.

The declaration charged defendant with operating his car in a reckless and negligent manner in violation of the statutory provisions of the automobile law. Excessive speed, failure to give warning of his approach and the passing of the Murray car on the right instead of on the left are counted upon as negligent operation. The jury found defendant guilty of negligence and awarded plaintiff the sum of $3,150 by way of compensation.

Defendant's assignment of errors raises a large number of questions affecting the defendant's negligence. The question of plaintiff's contributory negligence is also raised. We think this is the controlling question in the case. Plaintiff's own testimony is important on this question. Upon cross-examination he testified as follows:

"I could see and hear good. The house I occupy is the tenant house on the Locke farm and across the road from where he lives, something like 60 rods south. The Watts house is about 60 rods south of the house I live in as near as I can get at it. It is something like 120 rods from where this accident occurred to the Watts house. This was in broad daylight, about one o'clock in the afternoon, a very clear, bright day. From Watts' place clear down to where I was hurt the road was clear and any one could see any person that was in the road if they had looked at all, see them perfectly plain.

"*Q.* In other words, Mr. Snyder could have seen that car you were riding in if it was in the road any time after he broke over the hill by Watts' place?

"*A.* Yes, sir.

"*Q.* And you could have seen Snyder's car any time

from the time it broke over the hill by Watts' place until it hit you, had you looked?

"*A.* No, sir; I didn't look to see if there was any car coming back of me.

"*Q.* Had you looked you could have seen it?

"*A.* If I had looked?

"*Q.* Yes.

"*A.* I presume I could have looked and seen it if I had looked.

"*Q.* Don't you know you could?

"*A.* Sure I could if I looked.

"*Q.* But you didn't look?

"*A.* No, I didn't. I didn't see it at all before it hit me, and didn't even see it when I got into the Murray car. I didn't even see Watts when I got into the Murray car; in fact I didn't look that way at all. If I had looked that way at any time I could not have helped seeing Snyder. Murray stopped his car and let me in a little bit north of my house; the car was a runabout, one seat, room for two passengers. He drives from the left hand side. It is not a noisy car, does not make any more noise than a Ford. The back curtain of the top was rolled up, so my view of the road was not obstructed by the curtain particularly, nothing to prevent me looking back before I got out."

No error was committed in submitting to the jury the question of defendant's negligence, but even though it be conceded that defendant was violating the provisions of the statute in operating his car as he did, it was the duty of plaintiff to avoid injury to himself if he could do so by the use of ordinary care. The ordinary care which the law demands of one in the public highway similarly situated is to look before attempting to cross. This he admits he did not do. When plaintiff admits that the slightest glance upon his part would have averted the accident, the law cannot aid him even against one who is concededly negligent. This is the doctrine of the following cases and this case must be ruled by them: *Zoltovski* v. *Gzella,* 159 Mich. 620 (26 L. R. A. [N. S.] 435, 134 Am. St. Rep. 752); *Gibbs* v. *Dayton,* 166 Mich. 263;

Tolmie v. *Taxicab Co.*, 178 Mich. 426; *Ude* v. *Fuller*, 187 Mich. 483; *Barger* v. *Bissell*, 188 Mich. 366; *Fulton* v. *Mohr*, 200 Mich. 538; *Hill* v. *Lappley*, 199 Mich. 369.

The judgment must be reversed, with no new trial.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. OSTRANDER, C. J., concurred in the result.

REICHLE *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES.

   Where plaintiff stopped his automobile before crossing defendant's street car track, and looked, and there was no street car within 250 feet, the range of view, he was not guilty of contributory negligence, as a matter of law, in proceeding to cross, when he was struck and injured by defendant's car.

2. SAME.

   Where plaintiff, after he saw that a collision was inevitable, elected to receive a glancing rather than a direct impact, by turning to the right instead of continuing across, he was not as a matter of law, guilty of contributory negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

   Whether plaintiff stopped his car so far back as to make looking useless as a precaution, or whether he was careless and negligent in his observations were questions of fact for the jury.

4. SAME—NEGLIGENCE—ASSUMPTIONS.

   Plaintiff had a right to assume that if a street car were approaching at or beyond the 250-foot view, it would not

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See note in 32 L. R. A. (N. S.) 266.

be operated over and across a much traveled street at a speed in excess of 30 miles an hour.

5. TRIAL—INSTRUCTIONS—CONTEXT.

In an action against a street railway company for personal injuries caused by a collision between defendant's car and plaintiff's automobile, an instruction that "it is likewise the duty of the railway * * * to exercise reasonable care 'and' to provide those things that will * * * insure * * * the safety of the public," it being in dispute whether the word "and" was used, *held*, that even if used, the meaning was made clear by the context.

Error to Wayne; Des Voignes, J., presiding. Submitted April 23, 1918. (Docket No. 103.) Decided September 28, 1918.

Case by Louis Reichle against the Detroit United Railway for personal injuries and damage to his automobile. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody (*William G. Fitzpatrick*, of counsel), for appellant.

Lodge & Brown, for appellee.

BIRD, J. Plaintiff's automobile came in collision with defendant's trolley car at the intersection of Canfield avenue and Beaubien street in the city of Detroit, resulting in an injury to himself and damage to his machine. The salient facts in connection with the collision are: That plaintiff was driving, about dusk, in an easterly direction on Canfield avenue with his family and some friends. When approaching Beaubien street, which crosses at right angles, he slowed down and stopped from 20 to 25 feet from the west rail of defendant's track. Defendant's line on Beaubien street is a single track and cars are operated in a southerly direction only. Plaintiff was familiar with the situation and looked to the north and neither

saw nor heard an approaching car. He started his car and after shifting into second speed he looked again and saw a car approaching rapidly and only 50 feet away. Doubting his ability to clear the car by going directly across he turned it to the right preferring to receive the impact by a glancing blow rather than a direct one. The fender of the trolley car engaged the running board of his machine and carried it upwards of 160 feet before it came to a stop. The testimony tended to show that the car was being operated over the intersection at the rate of 30 miles an hour, and that its speed was not slackened after the motorman had opportunity to observe the plaintiff's position was one of peril.

Excessive speed, failure to give warning of its approach and a failure to slacken the speed of the car after discovering plaintiff's position are all counted on as grounds of negligence. The case was given to the jury on the question of defendant's negligence and the plaintiff's contributory negligence. They found a verdict for plaintiff in the sum of $1,500.

1. Was defendant guilty of negligence? Counsel very frankly concedes that as the record stands this question was one of fact for the jury. It will, therefore, be unnecessary to give it further attention.

2. Was plaintiff guilty of contributory negligence? It appears that from the point where plaintiff stopped his car he could see north on Beaubien street not to exceed 250 feet by reason of a building on the northwest corner of the intersection which stood flush with the street line. He testifies that he looked and saw no car. Neither did he see a headlight and, therefore, concluded the way was clear. He proceeded on his way and after getting his car started and in second speed he looked again when his car was within four or five feet of the west rail, and saw a street car approaching rapidly and within 50 feet of him. He con-

cluded he could not avoid a collision and therefore turned to the right in order to avoid a direct blow. When plaintiff stopped his car and looked and listened he appears to have been within the rule of ordinary prudence heretofore laid down many times by this court. To proceed across a street railway track where there is no car within 250 feet, nor within view, can hardly be said, as a matter of law, to be at variance with what the average driver of ordinary prudence would do under similar circumstances. Neither can it be said, as a matter of law, that plaintiff was guilty of negligence in electing to receive a glancing rather than a direct impact. Subsequent events seem to verify the wisdom of his election.

But counsel say that plaintiff either stopped his car so far back as to make looking useless as a protection, or if he stopped his car where he said he did he was careless and negligent in his observations. If these points are based upon any testimony in the case they are within the domain of fact. The court cannot say, as a matter of law, that plaintiff's conduct in those respects was negligent.

In testing plaintiff's conduct the jury were entitled to consider another phase. It is the experience of every traveler upon the highway that he is constantly shaping his course upon the assumption that other travelers, whether by foot or by vehicle, will do the thing which is usually done by reasonably prudent travelers (*Tiley* v. *Railway*, 190 Mich. 7; *Prince* v. *Railway*, 192 Mich. 194; *Travelers' Indemnity Co.* v. *Railway*, 193 Mich. 375; *McManigle* v. *Railway*, 193 Mich. 530), and therefore we think plaintiff had a right to assume that if a street car were approaching at or beyond the 250-foot view, it would not be operated over and across Canfield avenue, which the record shows is a much traveled street, at a speed in excess of 30 miles an hour.

3. During the course of the charge the court used the following language:

"It is likewise the duty of the railway, whether street or steam, to exercise reasonable care and to provide those things that will in a measure insure, as far as possible, the safety of the public, and those who use our streets and public ways."

Counsel observes that the law imposes no such degree of duty on the defendant in the case at bar. Counsel for plaintiff suggests that the word "and" following the word "care" has crept into the record through some error in transcribing, and that with this eliminated what the court said would be the law. We are inclined to the opinion that if the word was actually used by the court the meaning is made clear by the context.

We have examined the other errors complained of and are of the opinion that they are not well taken.

The judgment of the trial court is affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

F. M. SIBLEY LUMBER CO. *v.* DORAN.

MECHANICS' LIENS—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.

In proceedings to enforce a mechanic's lien, *held*, that plaintiff had failed to furnish the burden of proof that the lien was filed within 60 days after the last of the materials was furnished.

Appeal from Wayne; Withey, J., presiding. Sub-

See note in 49 L. R. A. 236.

mitted April 18, 1918. (Docket No. 120.) Decided September 28, 1918.

Bill by the F. M. Sibley Lumber Company against David Doran and others to enforce a mechanic's lien. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Leo P. Rabaut (*Lyle G. Younglove,* of counsel), for plaintiff.

James H. Pound, for defendants Doran.

BIRD, J. Plaintiff furnished lumber and materials to defendant Wilson with which to erect a dwelling house for defendants David and Ella Doran on Distel avenue, in the city of Detroit. The estimated cost thereof was $4,400. In order to secure the balance due upon this contract plaintiff filed a statement of lien on April 25, 1914. It appeared at the hearing that the first of the materials was furnished on October 23, 1913, and that the last was furnished on February 2, 1914. These dates of delivery were shown by a statement which had been made by the bookkeeper from the receipted delivery slips. At the conclusion of the proofs defendants' counsel made the point that the statement of lien was filed more than 60 days after the last of the materials was furnished and therefore the lien was invalid. This led to some discussion between counsel, after which the chancellor held that the filing was too late, consequently there was no lien.

Later a motion for rehearing was filed, argued, and granted. Further proofs were taken bearing upon the actual date the last of the materials was furnished. Plaintiff, to establish its contention that an error was made in copying the receipted delivery slips, produced them. The slip in question bore date of February

24th. The bookkeeper of plaintiff testified that the last slip was copied by him as February 2d, whereas it should have been the 24th of February. Other delivery slips were produced showing deliveries on February 4th and 5th, which were numbered respectively 4768 and 4805, whereas the slip in question was number 5032. It was argued from this that number 5032 must have been made at a later date than February 2d because the slips were numbered consecutively by a registering machine.

In opposition to this contention, defendants testified they moved into the house on February 12th, and that no materials were furnished after that date. Their testimony in this respect was corroborated by no less than six witnesses, some of whom were members of their family while others were their neighbors.

The explanation of the error by the bookkeeper of plaintiff appears to be reasonable and convincing. The testimony of defendants and their witnesses is also convincing. The materials which appear to have been the last delivered were several feet of porch rail. The absence of several feet of porch rail would be something which would likely be noticed by the members of the family as well as the act of Wilson or his foreman in supplying it. Therefore, there is not much chance for them to be mistaken in their testimony. If plaintiff is right in its contention these parties must have deliberately falsified concerning it. To say the least, the question is involved in serious doubt. It was the duty of plaintiff to furnish the burden of proof upon this question. We think it has failed to meet this burden and therefore its case must fail. The conclusion reached by the chancellor must be affirmed, with costs to the defendants Doran.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

VILLAGE OF OTSEGO *v.* ALLEGAN COUNTY GAS CO.

1. CONTRACTS—GAS—MUNICIPAL CORPORATIONS—FRANCHISE.
   A franchise for a gas company voted by the people of a village and afterwards accepted by the company constituted a contract between the parties.

2. SAME—GAS RATES—METER CHARGES—CONSTRUCTION OF FRANCHISE.
   Where the franchise provided that the rate for gas should not exceed $1.25 per thousand cubic feet, and that meters should be furnished free to the consumer, but that in case no gas was used and the occupant wished to retain the meter he should pay 75 cents per month minimum charge, *held*, no authority to charge a minimum rate of 75 cents per month where gas was used.[1]

3. SAME—BREACH OF CONTRACT—REASONABLENESS OF RATE.
   Where the franchise fixed the rates for gas, the reasonableness of a proposed minimum rate in violation thereof will not be considered by the courts.

Appeal from Allegan; Perkins, J., presiding. Submitted April 19, 1918. (Docket No. 43.) Decided September 28, 1918.

Bill by the village of Otsego against the Allegan County Gas Company to enjoin the collection of illegal charges. From a decree for plaintiff, defendant appeals. Affirmed.

Wilkes & Stone, for plaintiff.

A. H. Ryall, for defendant.

BIRD, J. In July, 1911, the village of Otsego voted by a three-fifths vote to grant to one C. A. Runyan a franchise to erect and operate a gas plant in the village for a period of 30 years. On July 29, 1911, the franchise was accepted in writing by the said

[1]See note in 26 L. R. A. (N. S.) 1109.

Runyan and filed with the village clerk. Soon thereafter the franchise was assigned by Runyan to the defendant. Defendant installed the plant and has been furnishing gas to the people of Otsego for five years and upwards, as is claimed, in accordance with the terms of the franchise. In February, 1917, defendant addressed a letter to its patrons, notifying them: "That on and after March 1, 1917, the Allegan County Gas Company will expect a minimum return of seventy-five cents per month from each of its meters," and advising them that this was made necessary by reason of the increased cost of materials and labor. The village authorities took the view that this charge was an illegal one and not justified by the franchise. This suit was filed to enjoin defendant from enforcing the collection of the increased rate. The sections of the charter which are material to the questions involved are the following:

"SECTION VIII.—RATES.—The rights and privileges herein granted are upon the express condition that said grantee and his assigns shall furnish merchantable, illuminating and heating gas to consumers, according to the provisions herein, and shall not charge or receive any higher rate for gas furnished the inhabitants of said village of Otsego than the following, to wit: (*a*) Until the village of Otsego shall attain a population of ten thousand (10,000) people the rate shall be not to exceed one dollar and twenty-five cents ($1.25) per thousand cubic feet. * * *

"VI.—All meters used for the purpose of furnishing gas for any purpose shall be furnished by said grantee and assigns, free of charge. Said grantee and assigns may remove meters from the premises of any person occupying same, providing no gas has been used for the period of a month; but if the occupant of such premises shall pay seventy-five (75) cents per month minimum charge, such meter or meters shall not be removed by the said grantee or assigns."

Plaintiff's construction of these franchise provi-

sions is that the maximum price of gas is fixed and definite and therefore whether much or little gas is used in a month, no more than the contract rate can be legally charged therefor. That no meter charge can be made except the one provided for in the franchise.

Defendant contends that it has a right to make the minimum charge, and gives the following reasons in support thereof:

"1st. Because the right to make a minimum charge is expressly recognized in the sixth paragraph of the franchise.

"2d. Because to hold that this minimum charge could not be made would result in requiring consumers who use no gas to pay the charge in question, while those who used some gas would be relieved of it.

"3d. Because the defendant has the inherent right to make reasonable charges of this sort, unless clearly restricted by the terms of its franchise or by other legislation, and there is nothing in the franchise which specifically forbids the making of a minimum charge.

"4th. Because the fact that a franchise forbids the making of a meter rental negatives any intention to prohibit the making of other reasonable charges, such as the minimum charge in question."

The chancellor who heard the case was persuaded that the contentions of plaintiff should prevail and a decree was made enjoining defendant from putting the increased rate into effect.

1. Defendant's assignee was desirous of obtaining a franchise from plaintiff to install and operate a gas plant. The franchise was voted by the people and afterwards accepted by him. The relations of these parties are therefore one of contract. 28 Cyc. p. 880; *City of Traverse City* v. *Telephone Co.*, 195 Mich. 373.

The contract is not ambiguous. It plainly states that "the rate shall be not to exceed one dollar and twenty-five cents ($1.25) per thousand cubic feet."

If the consumer uses four hundred feet of gas in a month at the rate stated he would owe the company fifty (50) cents. If, instead, he be charged seventy-five (75) cents therefor he is charged a rate in excess of $1.25 per thousand cubic feet, and this the contract forbids. To give the contract the construction contended for by counsel it would be necessary to read into it, "that consumers using less than six hundred feet in any month will be charged a minimum fee therefor of seventy-five (75) cents."

Counsel, however, argues that section VI authorizes a minimum charge for gas of seventy-five (75) cents, that the meter must be furnished free of charge, and that if no gas is used in any given month the meter may be removed, unless the consumer pays the minimum charge of seventy-five (75) cents *for gas*. Section VIII deals with the price of gas and fixes the price definitely. Section VI deals with meters. Had this been the intention it would doubtless have been expressed in paragraph VIII, which fixes the price to be paid for gas. Having dealt with it in the paragraph devoted to meters, it is fair to assume that the charge has reference to meters and not to gas. We cannot accept counsel's argument that a meter charge is forbidden by section VI. A meter charge is not forbidden by section VI in a certain contingency. The meter in the first instance must be furnished free to the consumer and he may use it free of charge as long as he uses some gas each month. If he desires to retain it, without using any gas, he must pay seventy-five (75) cents per month, or be deprived of it. In other words, the consumer is furnished a mechanical device free. He may retain it in one of two ways; either by taking gas each month, or paying seventy-five (75) cents each month. Under such a regulation we think the average mind would conclude that he was paying a meter rental rather than a minimum price

for gas. This was the conclusion of the parties to the contract and they dealt with each other for upwards of five years on the theory that this was the proper interpretation of the contract. In support of this construction, see *Montgomery Light & Power Co.* v. *Watts,* 26 L. R. A. (N. S.) 1109 (165 Ala. 370, 51 South. 726, 138 Am. St. Rep. 71); *Louisville Gas Co.* v. *Dulaney & Alexander,* 36 L. R. A. 125 (100 Ky. 405, 38 S. W. 703).

2. Much argument is indulged in by defendant to the effect that if the legislature has not fixed the rate and there is nothing in the contract forbidding it, that a public utility may fix its own rate. We have no contention with this proposition as our view is that the contract does forbid it.

3. Counsel has also discussed in his brief the question of the reasonableness of the proposed charge, and the reasonableness of permitting a minimum rate, and in support thereof has cited many decisions of public utility commissions. If we were sitting as a public utility commission, and had the power to determine upon the reasonableness of a minimum rate or whether a minimum rate should be charged, the argument and authorities would be most helpful. But such is not the case. We are called upon to construe the terms of a contract which the parties have deliberately made. The question as to whether the proposed charge is a reasonable one, or whether it is reasonable to allow a minimum monthly charge for gas, is not very important on this inquiry.

We are of the opinion that the chancellor reached the right conclusion, and the decree will be affirmed, with costs of both courts to the plaintiff.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

McCULLOUGH *v.* McCULLOUGH.

1. PROCESS—CRIMINAL CHARGE—EXEMPTION—EXTRADITION.
   A nonresident, charged with crime and brought within the jurisdiction of the court by compulsory process, is exempt from service of civil process while coming into the jurisdiction, while necessarily in attendance upon court, and while returning to his place of residence without unnecessary delay.
2. SAME—EXEMPTION—WAIVER.
   In an action in Michigan to recover installments of alimony which had accrued on a decree granted plaintiff for alimony alone in an Ohio court, the service of process upon defendant in the alimony suit while he was in Ohio under extradition to answer a criminal charge, was a violation of his privilege and unless waived is a valid defense to this action.
3. SAME—DAY IN COURT.
   Defendant, having instituted proceedings in the same court to have the alimony proceeding dismissed, and being denied relief, has had his day in court, and, it having been determined adversely to him, is not now available as a defense to this action.
4. DIVORCE—FOREIGN JUDGMENTS—CONSTITUTIONAL LAW.
   Although a decree for alimony in an Ohio court is subject to modification, the wife has a vested interest in installments already due and payable, entitled to recognition under the full faith and credit clause of the Federal Constitution.[1]
5. SAME—ALIMONY—TERMINATION OF DECREE.
   A divorce obtained by the husband in Michigan, where he had become domiciled, terminated the decree of an Ohio court for alimony alone as to installments falling due thereafter.

Error to Ingham; Collingwood, J. Submitted February 12, 1918. (Docket No. 26.) Decided September 28, 1918.

[1]See notes in 59 L. R. A. 178; 9 L. R. A. (N. S.) 1168; 28 L. R. A. (N. S.) 1068.

Assumpsit by Dora D. McCullough against Robert E. McCullough for alimony. Judgment for plaintiff. Defendant brings error. Affirmed, conditionally.

L. B. Gardner and *O. J. Hood*, for appellant.

Cummins & Nichols, for appellee.

BIRD, J. Plaintiff sued defendant in the Ingham circuit court to recover certain installments of alimony which had accrued on a decree granted her for alimony alone, by the common pleas court of Licking county, Ohio. Upon the trial plaintiff showed the marriage and desertion and made proof of the records of the Licking county court showing an allowance of $100 a month to plaintiff as alimony beginning on March 1, 1913, the same to paid monthly. It was further shown that no part of this allowance had ever been paid and that there was then due thereon the sum of $3,447.73. With this proof the plaintiff rested.

The defendant then attempted to show under his notice following the general issue the following facts:

"(*a*) That Mrs. McCullough, the plaintiff, about May 9, 1911, refused to live with the defendant.

"(*b*) That defendant, on or about May 9, 1911, turned over to plaintiff practically all the property he had, with the understanding and agreement that the same was to be in satisfaction for her maintenance and support and for the care, maintenance and support of their daughter.

"(*c*) That plaintiff realized from the property he turned over to her, more than $4,000.

"(*d*) That plaintiff went before the grand jury of the common pleas court of Licking county, State of Ohio, and through falsehood and deception, procured an indictment to be issued against him on the ground of nonsupport of their daughter.

"(*e*) That plaintiff procured said indictment for the purpose of getting defendant within the jurisdiction of Licking county, State of Ohio, for the purpose

of serving him with process in the case upon which she procured a judgment, which judgment she has brought this action on.

"(*f*) That plaintiff procured judgment against the defendant in the common pleas court of Licking county, State of Ohio, upon false statements, and statements that she knew to be false at the time she secured said judgment.

"(*g*) That at the time defendant was served with summons in the common pleas court of Licking county, Ohio, in which she secured judgment, which judgment this action is predicated, defendant was in attendance upon the common pleas court of Licking county, Ohio, by virtue of an indictment issued against him, out of said common pleas court of Licking county, charging him with nonsupport of their child.

"(*h*) That the service of process in said cause was made before he was able to leave the court house after his arraignment in the common pleas court of Licking county, State of Ohio, on said charge of nonsupport of their infant child.

"(*i*) That defendant was privileged from service of process while in attendance upon the court.

"(*j*) That defendant was advised by a lawyer in Licking county, Ohio, that it was unnecessary for him to enter his appearance in said cause or defend the same for the reason that the service so made was void; that he was told by the sheriff of Licking county, Ohio, that he need not pay any further attention to the proceedings in said cause and if any further steps were taken, he would notify the defendant of the same.

"(*k*) That he did not enter his appearance in said cause personally or by attorney.

"(*l*) That the defendant maintained his innocence and did not know that a plea of guilty was to be entered against him, in the common pleas court of Licking county, Ohio, on a charge of the nonsupport of their child. * * *

"(*n*) That plaintiff, knowingly and falsely claimed the defendant was making from $1,000 to $1,250 per month, at the time she took the judgment against him in Licking county, Ohio.

"(*o*) That at the time she made said claim, and when the judgment was taken, she had the greater

part of the $4,000 and over, which she had received from the properties he had turned over to her, in settlement of their property rights.

"(*p*) That he become a resident of Ingham county, State of Michigan, in about six weeks after plaintiff refused to live with him, to wit: May 9, 1911, and has been a resident of Mason, Ingham county, State of Michigan, ever since.

"(*q*) That for more than a year last past, he has been married and living with his wife in Mason.

"(*r*) That he returned to his home in Mason, Ingham county, Michigan, and never heard anything from the court nor the sheriff, regarding said suit, and supposed nothing further had been done in the case, until he was served with summons in this case. * * *

"(*t*) That on or about the 21st day of September, 1915, defendant obtained a decree dissolving the marriage between said parties, in the circuit court for the county of Ingham, Michigan.

"(*u*) That a decree in the Ohio courts for alimony is ambulatory in character, that is, may be changed at any time for cause shown."

The trial court refused to receive most of this evidence, holding in substance that while defendant was privileged from service of civil process while in attendance upon the criminal case in the State of Ohio he had waived that privilege.

1. It is the law in Ohio as elsewhere that if a nonresident is charged with crime and brought within the jurisdiction of the court by compulsory process, he is exempt from service of civil process, while coming into the jurisdiction, while necessarily in attendance upon the court, and while returning to his place of residence, providing no unnecessary delay occurs in returning. *Compton, Ault & Co.* v. *Wilder*, 40 Ohio St. 130.

Defendant was a resident of Michigan on December 12, 1912. On that day he was extradited from his home State to the State of Ohio. On December 18th he was taken before the court in Licking county,

and while in attendance upon the criminal proceeding he was served with civil process in the alimony proceeding. This was clearly a violation of his privilege and if he has not waived the privilege the defense is a valid one in the present proceeding, because it affects the jurisdiction of the court which made the decree. Indeed we do not understand that plaintiff denies this proposition but her counsel insist that defendant has waived his privilege because of the great lapse of time in failing to move to set aside the proceeding and because he filed a direct proceeding in the Licking county court to dismiss the alimony proceeding after this suit was commenced in Ingham county, which resulted in a denial of relief.

After this suit was commenced and on the 5th day of October, 1915, he instituted a direct proceeding in the common pleas court of Licking county to dismiss the alimony proceeding on substantially the same grounds that he is now raising in this suit. He was denied relief in that suit but it does not clearly appear upon what ground the decision was rested. By reason of this action we think it must be held that he has had his day in court upon that question, and it having been determined adversely to his contention it is not now available as a defense to this action.

2. The further defense is interposed that the decree of the Ohio court is not for a fixed and definite amount, that the judgment is ambulatory and therefore is not such a judgment as comes within the full faith and credit clause of the Federal Constitution. This contention is met by plaintiff with the assertion that the judgment is final as to installments which are already due and payable.

Our attention has been called to no statute which authorizes the Ohio courts to modify a decree for alimony, although that power is exercised by them. *Olney* v. *Watts*, 43 Ohio St. 499 (3 N. E. 354). Pre-

sumably the exercise of this authority is based upon their common-law right. Assuming as we must that the decree in question for alimony is subject to modification, does this power affect the installments already matured and are the matured installments entitled to recognition under the full faith and credit clause of the Federal Constitution? This precise question is considered and decided in *Sistare* v. *Sistare,* 218 U. S. 1 (30 Sup. Ct. 682, 28 L. R. A. [N. S.] 1068), where the former holdings of that court are discussed and harmonized by Mr. Justice WHITE. In that case it was said in part:

"We think the conclusion is inevitable that the *Lynde Case* [181 U. S. 183 (21 Sup. Ct. 555)] cannot be held to have overruled the *Barber Case* [21 How. (62 U. S.) 582], and therefore that the two cases must be interpreted in harmony, one with the other, and that on so doing it results: *First,* That, generally speaking, where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber Case,* 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record until the decree has been recalled, as any other judgment for money is.' *Second,* That this general rule, however, does not obtain where by the law of the State in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even though no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due."

This holding by the Federal court sustains plaintiff's contention that she has a right to recover on

installments of alimony already due and payable, inasmuch as the qualification of the rule laid down in the second proposition is satisfied by the holding of the supreme court of Ohio that she has a vested interest therein. *Coffman* v. *Finney*, 65 Ohio St. 61 (61 N. E. 155, 55 L. R. A. 794).

But counsel for defendant contends that even if plaintiff is entitled to recover she is not entitled to recover installments which fell due after the date of the decree of divorce rendered by the Ingham circuit court. This raises the question whether the decree of divorce granted to defendant by the Michigan court abrogated the decree or order for alimony theretofore made by the Ohio court. It is clear that the Michigan decree could have no effect upon the installments which had matured at the time of its rendition, because as to those installments plaintiff had a vested interest. *Coffman* v. *Finney*, *supra*. But we are of the opinion that the divorce decree so changed the legal relation of the parties that the Ohio decree as to future alimony was no longer of any force. We have been much influenced in reaching this conclusion by the case of *Harrison & Saunders* v. *Harrison*, 20 Ala. 629 (56 Am. Dec. 227), which discusses the question upon a state of facts which differ in no material respect from those involved here. It is held in that case that the subsequent decree of divorce obtained by the husband in another State to which he had removed and in which he was domiciled put an end to the decree for alimony as to installments falling due after the divorce. In the concluding paragraph of that case it is said:

"We are of opinion that both decrees may stand so far as in their results they are not incompatible with each other. The subject-matter and object of each are wholly different. The first seeks to enforce the obligations and duties springing out of the relation of marriage; the second, entirely to annul that rela-

tion, and having effected the contemplated object, puts a period to the operation of the first, which is necessarily dependent upon that relation."

We are content with the reasoning of this case and think it should be applied to the facts under consideration. It follows, therefore, that defendant's offer to show that a divorce was granted to defendant in the Ingham circuit court was competent and material and should have been received. The plaintiff will be permitted to recover on installments due and payable at the date of the divorce decree but nothing more. The case must be reversed unless counsel can agree how much was due at that time. In the event that counsel file in the trial court a stipulation of the amount due within thirty days from the date of filing this opinion a judgment for the stipulated amount will be affirmed, otherwise the judgment will be reversed and a new trial ordered with costs in either event to the defendant.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WILLETT v. KING.

1. CARRIERS—TRESPASSER—REFUSAL TO PAY FARE—EJECTION FROM TRAIN.

A person who enters a train and refuses to pay his fare when lawfully demanded is a trespasser and not a passenger, and at common law the carrier is not required to put him out at one place rather than another, provided he is not wantonly exposed to peril or to serious personal

See notes in 26 L. R. A. 129; L. R. A. 1915C, 140.

injury; but if left in a place of special and peculiar danger when he is manifestly incapacitated for looking out for himself, and is injured, there may be liability.

2. PLEADING—PROOFS—VARIANCE—CARRIERS.

Where plaintiff's declaration alleges that he was a passenger on defendants' train, but his proofs show that he was a trespasser, there is a variance between pleadings and proofs.

3. APPEAL AND ERROR—VARIANCE—WAIVER.

Where a variance between pleadings and proofs, in a cause that had twice been tried, was first raised in defendants' requests to charge, the objection came too late, since if raised at the proper time the question of plaintiff's right to amend would then have been presented.

4. CARRIERS—TRESPASSER—EJECTION FROM TRAIN—OPPOSITE DWELLING HOUSE—STATUTES.

Where plaintiff, who had refused to pay his fare upon defendants' train, was ejected a short distance from a highway on which there was a house about 55 rods from the crossing, he was put off opposite a dwelling house within the meaning of the statute (2 Comp. Laws 1915, § 8297).

5. SAME—PERSONAL INJURIES—NEGLIGENCE—DIRECTED VERDICT.

In an action for personal injuries to plaintiff who was ejected from defendants' train on his refusal to pay fare, where plaintiff walked off the train, and, beyond the fact that he was somewhat intoxicated, there was nothing to excite the belief that he could not take care of himself, and there was no evidence of a wilful disregard of his personal safety, and he was not put in peril by the trainmen, the court should have directed a verdict for defendants.

Error to Montcalm; Davis, J. Submitted June 4, 1918. (Docket No. 21.) Decided September 28, 1918.

Case by Richard Willett against Paul King and another, receivers of the Pere Marquette Railroad Company, for personal injuries. Judgment for plaintiff. Defendants bring error. Reversed.

Parker, Shields & Brown (*Hawley & Eldred*, of counsel), for appellants.

L. G. Palmer and *George E. Nichols*, for appellee.

OSTRANDER, C. J. Plaintiff, 48 years old, a small farmer, owning 20 acres of land and working that and another 20 acres, on Saturday, March 15, 1913, drove his team of horses to Stanton, Montcalm county, put them in a barn, and by way of the Pere Marquette railroad journeyed to Lowell, in Kent county, arriving there at about 4 o'clock in the afternoon. His principal purpose in making the journey seems to have been to get drunk and to purchase liquor to take home with him, liquor not being procurable by purchase in Montcalm county. He became intoxicated, and, with a package containing a gallon of whisky, he left Lowell at about 7:10 in the afternoon by the Pere Marquette north-bound train. He had sufficient money to pay his fare, and more, but bought a ticket only to Greenville, a station intermediate Lowell and Stanton. When the ticket was taken up and he said he was bound for Stanton, he was told that he must pay fare beyond Greenville or leave the train there. As he did not pay his fare beyond Greenville, when it was demanded he was put off of the train, which was stopped for that purpose at the Taylor or Abbey crossing, about 4½ miles from Greenville and 3½ miles from Sydney, the next station. The train was stopped upon the highway. The point where he alighted was a short distance south of the highway between which and himself was the usual cattleguard. Having alighted, he told the conductor that he had left his package in the car, who got it and gave it to him. This was shortly after 8 o'clock. In the neighborhood of the Abbey crossing, the country is well settled. The nearest house, Mr. Abbey's, is about 55 rods from the crossing on the south side of the highway. It was lighted, the light being visible from the right of way. At some time between 10 and 12 o'clock, two men,

who had walked from Greenville to the crossing, saw and talked with plaintiff, who was sitting on the ground near the rail. To these men plaintiff told his name, where he lived, that he had been to Lowell and had been put off of the train because he would not pay his fare, that he was resting and would go on when rested. He inquired, and was told, the distance to Sydney. He was invited by one of the men to go with him and remain the night, and plaintiff told him to mind his own business, he could take care of himself. On Sunday morning, one of these men, going to Mr. Abbey's house, went down the track, finding plaintiff asleep by the fence and some 40 feet from the place where he was the night before. He awakened plaintiff. Going down to the Abbey house, Mr. Abbey and this witness returned to where plaintiff was, and after some talk plaintiff went with them to the Abbey house. The jug of whisky was then from one-half to two-thirds full. Plaintiff carried it, and on the way drank from it. At the house, he had coffee, but ate no food, remained three or four hours in a warm room, complained some of a headache and pain in his stomach. About 1 o'clock in the afternoon, Mr. Abbey told plaintiff that if he was going to walk to Sydney he ought to be on his way. At plaintiff's request, the three men walked to a neighbor's house, a mile away, where was a telephone, by which a message was sent to a friend of plaintiff at Sydney. During this trip, it was contrived to tip over plaintiff's jug and lose some whisky, the remainder, about a quart, being put into a bottle, and given to him. The three men then went to the railroad at Hansen's crossing, where, at about 2 o'clock, they separated, plaintiff going up the track in the direction of Sydney. He did not proceed far. During the night, or on Monday morning, he went to an outhouse in a field, remained there, or about there, all day Monday, and in the

evening walked to Sydney and there took the train for Stanton. At some time during this outing, his feet were frozen. In May, following, one foot and part of the other were amputated. The temperature during Saturday night and Sunday, at Grand Rapids, was, at its coldest, 18 degrees, at midnight, Saturday. It was 9 degrees between 5 and 7 o'clock the morning of the 17th, Monday morning.

In outline, these are the facts appearing upon the trial and are not disputed. Aside from the question of the amount of damages plaintiff should recover, there were three questions of fact submitted to the jury. One was whether, in fact, plaintiff was discharged from the train opposite a dwelling house, within the meaning of the statute, 2 Comp. Laws 1915, § 8297, which reads:

"If any person shall refuse to pay his fare, or refuse to obey such regulations as may be established for the convenience and safety of passengers, it shall be lawful for the conductor of the train and servants of the company to put him off the train at any usual stopping place, or opposite any dwelling house the conductor may select."

Another question was whether plaintiff's feet were frozen before Sunday morning, when he went to the Abbey home, or were frozen afterwards. The third question involved, as the charge was given, determination of plaintiff's condition when he was put off of the train, and not only his actual, but his apparent, condition, and his discoverable condition.

The form of the action is trespass on the case. Allegations therein proceed upon the premise, or after statement of the premise, that, having been accepted as a passenger upon the train, various duties were owed to plaintiff by the trainmen. Among the duties alleged, generally, is the duty not to eject him or put him off of the train at any point except at a usual

stopping place or opposite to some dwelling house, and the further duty to see to it that he was not exposed, in his alleged condition, to unusual hazards, to weather or other conditions which might cause him injury. Performance of these duties is negatived. The declaration does not *count upon* the statute, nor refer to it, nor does it refer to the fact that plaintiff was put off of the train because he did not pay his fare.

There was a substantial verdict for plaintiff, upon which judgment was entered. There are 41 assignments of error discussed in the brief for appellants, under the headings, Admission of Demonstrative Evidence, Plaintiff's Poverty, Opinion of Witnesses, Argument of Counsel, The Court Should Have Directed a Verdict for the Defendant, Errors in the Charge as Given.

The verdict being general, with no special finding, it is not possible to know what action of the trainmen the jury condemned. The jury was advised that, having refused to pay his fare when it was demanded, the plaintiff was a trespasser, liable to be ejected from the train, the right to eject him being limited by the statute provision above quoted. That nominal damages, at any rate, were recoverable if the ejection was at a place not within the statute designation. And whether the place was opposite to a dwelling house was to be determined by them. It is assumed that they observed and followed the instructions given them by the court. These required them to find that plaintiff's feet were frozen during Saturday night before plaintiff was in a safe place in the Abbey home. They required them to find either that plaintiff was ejected from the train at a point not opposite to a dwelling house, or whether opposite to a dwelling house or not, that he was ejected when his evident, or apparent, or discoverable, condition forbade that

he be ejected at all except at a place where he would be looked after, as at a station. As a general summary of the instructions upon the point, the court said:

"So you see much rests, gentlemen, upon the question whether under all of those conditions the conductor had reason to believe, or ought to have believed from his observations, or should have discovered whether the man was able to take care of himself at that particular time and place."

The defendants requested the court to charge that:

"Under the testimony in this case the plaintiff was a trespasser and not a passenger upon the train in question at the time he was ejected therefrom by defendants' conductor. Under those circumstances the conductor had the right and it was his duty to eject him from said train at any usual stopping place of said train or opposite to or near a dwelling house unless said defendant (plaintiff?) was so drunk that he did not know or comprehend what he was doing, and could not care for himself, and unless the conductor had full knowledge of his helpless condition, and notwithstanding such knowledge, grossly and wantonly put him off the train under such circumstances as might be naturally and reasonably expected to result in injury and damage to said plaintiff, and with reckless disregard of plaintiff's safety."

Further requests emphasized the defendants' contention, as, for example, the request that:

"It is not sufficient to entitle the plaintiff to recover in this case for him to establish that in ejecting him from the train the conductor did not exercise ordinary and reasonable care under the circumstances of the occasion; but it is incumbent upon him to go further and establish the fact by a preponderance of the evidence that the conductor in ejecting him from the train on that occasion knew that he was in a condition in which he was unable to help and care for himself and was guilty of gross and wanton disregard of his rights and safety in expelling him from the train.

"Unless you find in this case that the conductor ejected the plaintiff from the train on the night in question when plaintiff was in a helpless condition and when the conductor knew of said helpless condition and under such circumstances as indicated a gross and wanton disregard of plaintiff's rights and of the injurious consequences which might reasonably be expected to result to him the plaintiff cannot recover."
* * *

Other requests preferred by defendants ask for a peremptory instruction in their favor, one because there is a variance in pleadings and proofs in that the declaration alleges that plaintiff was a passenger and had the rights of a passenger, while the proofs show he was a trespasser, to whom defendants owed none of the alleged duties owed to a passenger; another because plaintiff's own negligent acts and conduct contributed to whatever injury he sustained; another that having been discovered and invited to a place of safety after he was ejected and before he received injury defendants were then and there relieved of any further duty or obligation in the premises; another that there is no proof showing that plaintiff had received injury before the time when he was admitted to the house of Mr. Abbey on Sunday morning; and still another to the effect that there is no evidence that the conductor in ejecting plaintiff acted with gross or wanton disregard of plaintiff's rights, and that the jury might not speculate with regard to whether plaintiff received his injuries on Saturday or on Sunday night.

It has been many times decided that if a person enters a train and refuses to pay his fare when lawfully demanded, he is a trespasser and not a passenger, and at common law the carrier is not required to put him out at one place rather than another, provided he is not wantonly exposed to peril or to serious personal injury. 3 Elliott on Railroads, § 1255; 4

Elliott on Railroads, §§ 1583, 1637; *Wyman* v. *Railroad Co.*, 34 Minn. 210 (25 N. W. 349); *Podespik* v. *Railway Co.*, 216 Mass. 213 (103 N. E. 638). Of course, if such a person is, in any case, left in a place of special and peculiar danger when he is manifestly incapacitated for looking out for himself, and is injured, there may be liability for the injuries. *Black* v. *Railroad Co.*, 193 Mass. 448 (79 N. E. 797, 7 L. R. A. [N. S.] 148, 9 Ann. Cas. 485). In *Gaukler* v. *Railway Co.*, 130 Mich. 666, plaintiff was put off of a train, having refused to pay his fare. The negligence complained of was (1) that he was left in a place of danger, (2) abandoning him to look out for himself when he was incapable of doing so by reason of his intoxication. Plaintiff was afterwards injured by a passing engine, which struck him while he was walking between two tracks on the railroad right of way. In reversing the judgment for plaintiff, this court said:

"The testimony of these two officers is all that shows that the man was put off near Farnsworth street, instead of at the Lake Shore junction, and they agree that he left the track, and went with them to the flagman's shanty, 25 or 30 feet east of the tracks. We may treat the case, then, as though he had been left at that point, and taken 25 or 30 feet from the tracks, in a public and well-frequented street in the city, and left in the presence of two citizens, and the question of the fitness of the place where the train stopped is eliminated. In this respect the case is like that of *Hamilton* v. *Railroad Co.*, 183 Pa. St. 638 (38 Atl. 1085), where one walked back to a station after being carried by, and was there injured. The court said it was as though he had gotten off at the station.

"Plaintiff's counsel insist that it must be left to the jury to say how drunk the man was, and whether, under the circumstances, it was negligence to put him off. We should add to that, 'And leave him 25 feet east from the tracks on a public highway, in the presence of two officers, who were conservators of the

peace.' The evidence in this case is practically undisputed. Every witness who testified said that the man could walk and could talk. He knew that fare was required of him, and he insisted that the conductor should carry him for the same fare that the electric line charged; and, when he was informed that he could not do so, he refused to pay more, and at once acquiesced in the conductor's demand that he leave the train. He alighted unaided. He then left the track to go to Detroit, found some citizens and inquired the way, but declined to go with them. All knew that he had been drinking—perhaps considered him drunk—but the testimony of no one indicates that he was unable to care for himself. All, from the saloon keeper—who testified that he was in the habit of keeping track of his patrons' trains, that they might not miss them, so that they might freely drink all that they were disposed to buy, and who obligingly assisted them to their respective trains—to the last man to talk to him, agree that he was able to care for himself, though drunk. There is nothing on this record to make it incumbent on this conductor to do more than to see that this man, in his apparent condition, left the railway premises, and was talking with citizens 25 feet away from a point of danger. If there was any negligence at any stage of the proceeding—which we do not intend to intimate—it ceased as a factor in this case when the plaintiff left the premises and reached a place of safety."

In considering a similar case in which a Canadian statute was relied upon, this court said, in *The Great Western Railway Co.* v. *Miller*, 19 Mich. 305, 313:

"The liability for putting a person off from the cars at a distance from any dwelling, or station, is purely statutory, and no damages can be recovered for that specific grievance, unless the statutory provision is set out and a case made out under it by the pleadings. A carrier is not required by the common law to put out a trespasser at one place rather than in another, and while the law will not permit a person to be exposed wantonly to peril, there is no rule which requires any consideration to be shown for the mere convenience of a wrong-doer."

The variance of pleadings and proofs is clear. The declaration alleges that plaintiff was a passenger and alleges, by intendment, at least, various positive contract duties arising out of the relation of carrier and passenger. The case made by plaintiff upon the testimony negatives the existence of any contract or of any positive duty owed to plaintiff.

The statute aside, the plaintiff's case upon the testimony is the case of one not a passenger, but a trespasser, with whom the carrier had no contract relations, to whom no positive duty was owed, but only the non-positive duty not to wilfully do him injury. This point was not raised during the trial—at least, we are referred to no ruling and no exception which presents it—nor until the testimony was concluded and defendants' requests to charge were preferred. If it had been made when plaintiff's testimony showed that he was not a passenger, or perhaps upon a motion to strike out all of the testimony for plaintiff, with a ruling favorable to defendants, the question of plaintiff's right to amend would then have been presented. This cause has twice been tried. We think the objection came too late, and that the judgment ought not to be reversed for this reason.

So far as the statute is involved, the contention may be disposed of by the facts. The court should have instructed the jury that the point at which plaintiff alighted was opposite a dwelling house, within the meaning of the statute. As used in the statute, the word means: Placed over against; standing or situated over against or in front; facing; often with *to;* as, a house opposite to the Exchange. Webster's Inter. Dict. Since 1855, this provision has been in the statutes. It is a limitation upon a common-law right. Applicable to nearly all railroads in the State, in all portions of the State, it must have been in-

tended as a humane provision to secure a rejected or ejected passenger reasonable means of communicating with his fellows. The house in question was little more than one-eighth of a mile distant, and was in view. In a city like Lansing, the distance was a little more than the length of two city blocks and the intervening street.

Plaintiff went to the station at Lowell, purchased a ticket and boarded the train. After leaving Greenville, he tried to borrow money to pay his fare, the conductor waiting his success in that behalf. He walked off of the train. He demanded his jug, and it was given to him. Beyond the fact that he was somewhat intoxicated, there was nothing to excite the belief that he could not take care of himself. There is no evidence of a wilful disregard of his personal safety. He was not put in peril by the trainmen. His only peril was from the elements, and that was inconsiderable unless he was for a long time exposed to them and was himself inactive. He was offered and refused shelter for the night, after learning where he was. But, he says, he immediately addressed himself to the jug and its contents. When he was found, in the morning, asleep, and apparently safe and sound, the jug was from one-half to two-thirds full. Plaintiff is to be pitied, but it would be plain injustice to require defendants to repair, so far as money can repair, the consequences of his own folly.

We are of opinion that the court should have directed a verdict for defendants. In this view, it is unnecessary to discuss other assignments of error.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

COHN-GOODMAN CO. v. PEOPLE'S SAVINGS BANK OF GRAND HAVEN.

1. BILLS AND NOTES—NEGOTIABLE INSTRUMENTS—CONTRACTS—ASSIGNMENTS.

   A certificate of deposit containing the stipulation that it was payable "on the return of this certificate properly indorsed," was a contract, the title to which would pass by assignment, and the assignee could recover in a suit thereon to the same extent that his assignor could, and the question of its negotiability is not controlling.

2. BANKS AND BANKING—CERTIFICATE OF DEPOSIT—PAYMENT—LIABILITY OF BANK.

   Where a bank paid the amount represented by a certificate of deposit to the person depositing same, without requiring the return of the certificate duly indorsed, which it was not required to do by the terms of the instrument, it acted at its peril in so doing.

3. SAME.

   The mere fact that a person deposited money payable to another, receiving a certificate of deposit therefor, gave him no right to receive the money nor the bank the right to pay him without the return of the instrument duly indorsed.

4. APPEAL AND ERROR—TRIAL—SPECIAL QUESTIONS.

   The refusal of the court below to submit special questions, none of which was controlling, was not erroneous.

5. PLEADING—BILL OF PARTICULARS—VARIANCE.

   In an action on a certificate of deposit, where plaintiff was allowed to trace the money and to show whose money was deposited and the circumstances of the transaction, there is no merit in the contention that plaintiff was allowed to ignore its bill of particulars which stated the cause of action consisted of a certificate of deposit, a copy of which was set forth in the declaration, since there was no effort to change the terms of the certificate which did not state that the money belonged to the one depositing it, or that it was payable to him in any contingency.

6. DEPOSITIONS—OBJECTIONS—WAIVER—STATUTES.

   Objections to depositions not made within ten days under

3 Comp. Laws 1915, §§ 12494, 12497, and not noticed for hearing under Circuit Court Rule No. 37, will be regarded as waived.

7. APPEAL AND ERROR—DEPOSITIONS—DIRECTED VERDICT.

Where plaintiff's evidence warranted a directed verdict in its favor without receiving in evidence a deposition of its president, any error in its reception becomes unimportant.

Error to Ottawa; Cross, J. Submitted June 7, 1918. (Docket No. 65.) Decided September 28, 1918.

Assumpsit by the Cohn-Goodman Company against the People's Savings Bank of Grand Haven on a certificate of deposit. Judgment for plaintiff. Defendant brings error. Affirmed.

Charles E. Soule (*Charles E. Misner*, of counsel), for appellant.

Lillie, Lillie & Lillie, for appellee.

STONE, J. Action to recover the amount claimed to be due plaintiff upon a certificate of deposit issued by defendant. In April and May, 1917, the plaintiff, an Ohio corporation, was engaged in the business of merchandising at Cleveland, Ohio. Charles P. Jacobs was one of plaintiff's traveling salesmen, and as such visited the city of Grand Haven on April 30, 1917. He was arrested on that day on a warrant issued by Isaac N. Tubbs, a justice of the peace, charged with having made a felonious assault on a little girl, and while in custody of the sheriff in the jail he employed Charles E. Misner, an attorney, to defend him, and Misner saw Jacobs at the jail and they both communicated with the plaintiff by telephone. The precise conversation between Misner and the plaintiff was a disputed matter. It was undisputed that Misner arranged with the justice that the security for Jacobs' appearance in the circuit court should be the

sum of $500 in cash in lieu of a bond. It was the claim of the plaintiff, and there was evidence tending to support the claim, that Misner informed the plaintiff that if $500 was put up as security, and Jacobs appeared in the circuit court for trial, the money would be refunded to the plaintiff.

Upon the trial of the instant case Jacobs testified that when Misner was talking with Mr. Cohn over the telephone, before the money was sent, that Misner said:

"I can't do it; I am not able to do it; I must have $500 cash bond to put up; the money will be returned to you on the termination of the trial."

This was denied by Misner. All agree that plaintiff wired $500 to Jacobs, and also telegraphed Misner on May 1st:

"Telegraphed Jacobs by Western Union Telegraph Company this morning at 8 o'clock, five hundred, care of sheriff."

The sheriff went with Jacobs and got the telegraph company's check for $500 on the State Bank, went to the said State Bank and got the currency, the sheriff there identifying Jacobs. They then went to the People's Savings Bank of Grand Haven, the defendant here, where they met Misner and Tubbs, the justice. Jacobs gave the money to Misner, either in the street or in the last named bank. Misner had been to the bank and had dictated the form of a certificate of deposit. Either the justice or Misner handed the money to the assistant cashier, and the latter handed to the justice the certificate of deposit, which was in the form following:

"PEOPLE'S SAVINGS BANK OF GRAND HAVEN, MICHIGAN.

"No. 12743. Grand Haven, Michigan, May 1, 1917.

"Charles E. Misner has deposited in this bank five hundred dollars ($500) payable to the order of Isaac

N. Tubbs in case of default of the bond given in the case of the People vs. Jacobs on the return of this certificate properly indorsed.

"A. E. GALE,
"Assistant Cashier."

The justice made due return to the county clerk in the case, and to his return he attached the certificate of deposit, indorsed by him. Jacobs subsequently, and in August, 1917, duly appeared at the circuit court, was tried upon the charge against him, and was acquitted. Misner remained the attorney of Jacobs for a short time, when he was discharged by Jacobs, who employed other counsel. Within a day or two after Jacobs was acquitted Misner demanded the certificate of deposit of the county clerk. In the meantime the plaintiff had sent an order by its Cleveland attorney (who was in attendance at the trial) to the county clerk asking the clerk to send them a draft for the amount of the money. The county clerk refused to deliver the certificate of deposit to Misner, and he at first refused to deliver the certificate on the order of the plaintiff. But upon a bond of indemnity in the sum of $1,000 having been given to the county clerk to save him harmless, he delivered the certificate to the attorney for the plaintiff.

By consent of counsel on the trial in the instant case, the following statement of the prosecuting attorney was read in evidence:

"On the back of certificate of deposit in dispute in the case, above the name of Isaac N. Tubbs, J. P., I wrote the words 'Pay to Ottawa Co. Clerk,' so that the county clerk should have control of the same, as if it were a proper recognizance filed in the case."

Upon the delivery of the certificate by the county clerk he indorsed the same. The certificate of deposit was by its attorney delivered to the plaintiff at Cleveland. It appears that Jacobs also indorsed the certifi-

cate. The plaintiff indorsed and deposited it in its bank in Cleveland, and it went forward to defendant through various banks for collection, and was presented to the defendant for payment. Payment was refused and the certificate of deposit was protested for nonpayment on August 21, 1917. It appeared on the trial that in the meantime the defendant, upon the demand of Misner, had paid the amount of the certificate to him, upon his furnishing evidence of the appearance and acquittal of Jacobs, although he (Misner) did not have possession of, or return the certificate in question.

There was evidence on behalf of plaintiff upon the trial that the money represented by the certificate of deposit belonged to, and was the money of the plaintiff and not of Jacobs.

It was the claim of the defendant that the money belonged to Jacobs, and that he authorized Misner to draw the money and deduct an amount due him for services, and that the defendant was justified in paying over the money to Misner, as the certificate showed that he deposited it, and it appeared that Jacobs had not made default.

The trial court submitted the case to the jury upon the following statement of the claims of the parties:

"It is the claim of the plaintiff that it sent $500 here to secure the appearance of Mr. Jacobs for trial; that the money was deposited with the defendant bank and a certificate of deposit issued; that Mr. Jacobs appeared as required, and that afterwards the certificate of deposit was delivered to the plaintiff, and demand for return of the money made upon the bank; that the bank refused to pay the money to the plaintiff, and thereupon the plaintiff commenced this suit to recover the sum of $500 and the interest thereon at 3 per cent. from the first day of May, 1917, and the protest fees on the certificate of deposit. * * *

"The defendant claims that the money was deposited by Charles E. Misner, and that the money belonged

to Charles Jacobs, and that Mr. Jacobs appeared for trial as required, and that afterwards the money was paid to Charles E. Misner on his demand; that Mr. Jacobs authorized Mr. Misner to draw the money and deduct his fees from the same, and return the balance to him. Those are the claims of the parties."

The jury were also charged as follows:

"In order to render a verdict for the plaintiff for the amount due on the aforesaid certificate of deposit and the protest fees, you must find by a preponderance of the evidence in this case that the plaintiff, the Cohn-Goodman Company, was the owner of this money represented by said certificate at the time this suit was commenced; that the said plaintiff, the Cohn-Goodman Company, sent to Charles P. Jacobs, through the Western Union Telegraph Company, $500, and that Mr. Jacobs received that money, and that the same was deposited in the People's Savings Bank of Grand Haven, and the above certificate of deposit issued therefor; that the above certificate was indorsed by Isaac N. Tubbs, Orrie J. Sluiter, and Mr. Jacobs, and then went through the regular course of proceedings, and was finally received by the People's Savings Bank of Grand Haven through the regular course of business, the payment refused thereon and protest made by said bank when the bank received said certificate of deposit for payment through the regular course of business aforesaid; and that the money represented by said certificate of deposit was not the money of Charles E. Misner, although it is represented by said certificate that Charles E. Misner deposited said money. And if you do so find by a preponderance of the evidence, then your verdict will be for the plaintiff for said $500 and interest thereon at 3 per cent. from May 1, 1917, to date, and the protest fees as shown you by the evidence given herein. And if you fail to so find, your verdict will be for the defendant."

The trial resulted in a verdict and judgment for the plaintiff for the amount of the certificate and protest fees. The defendant has brought the case here, and there are 43 assignments of error. These are

not discussed by appellant, but the brief presents and discusses certain propositions, some of which appear to be covered by assignments of error.

It is first argued that the instrument sued upon is not a negotiable instrument and is not subject to the incidents of negotiable paper. We do not think that question a controlling one in the case. It is at least a contract and contained the stipulation that it was payable "on the return of this certificate properly indorsed." The title to it would pass by assignment, and the assignee could recover in a suit thereon to the same extent that his assignor could. *First National Bank* v. *Carson,* 60 Mich. 432.

In order to reach the conclusion which they did, the jury must have found under their instructions that the money represented by the certificate belonged to the plaintiff. The defendant saw fit to pay over to Misner the money represented by this paper, and without requiring its return or surrender duly indorsed, and in doing so it acted at its peril. It was not required so to do by the terms of the instrument. It has been held:

"The condition that the certificate be surrendered at the time of its payment is no more than the law would require without a provision to that effect." *Zander* v. *Trust Co.,* 178 N. Y. 208 (70 N. E. 449, 102 Am. St. Rep. 492).

That language was used in speaking of a nonnegotiable instrument. There was no claim that it was a lost instrument. The party who, according to the finding of the jury, actually owned it, after it had performed its function, had possession of it, and presented it for payment properly indorsed. Payment was refused by defendant on the ground that it had paid the money to Misner because he had deposited it. Both officers of the defendant who testified stated that

the certificate came back to the bank in the regular course of business for collection.

It is next urged that the indorsements did not show title to the certificate, in the plaintiff, the last indorsement being "Pay to the order of any bank or banker," etc. We think there is no merit in this point, as the declaration stated that the plaintiff was the owner of the certificate and there was evidence tending to support the allegation.

It is next urged that the defendant refunded the money deposited to Misner, the depositor, before it had any notice that it belonged to plaintiff. What we have already said covers this point. The contract was to pay "on the return of this certificate properly indorsed." The defendant instead of standing upon its contract rights, saw fit to pay money to Misner, because he had deposited it. The mere fact that he had deposited money payable to another, gave him no right to receive the money, nor the defendant any right to pay him, without the return of the instrument duly indorsed. It should be borne in mind that the instrument did not state that the defendant would pay the money to Misner if Jacobs did not make default. There was no contingency stated in which the certificate was to be payable to Misner. We think the defendant could, and should, have protected itself by not paying the money, until the certificate was returned properly indorsed. It had it in its power to protect itself, but seems to have negligently paid the money to Misner, and now claims that the plaintiff should suffer because of such course. In our opinion the defendant is in no position to complain.

It is next urged by appellant that certain special questions which it presented should have been submitted to the jury and answered. We have examined the questions, and, without setting them forth here, it is sufficient to say that none of them was control-

ling, and, within our decisions, there was no error in refusing to submit them.

The declaration set out the transaction leading up to, and the deposit of the money, and the giving of the certificate, which was also set forth in full. The defendant demanded a bill of particulars, which was furnished. It stated that the cause of action consisted of the certificate of deposit, a copy of which was set forth in the declaration, and the interest thereon and the protest fees. It is urged by appellant that the plaintiff was permitted to ignore its bill of particulars and prove many things not mentioned therein, and that it was error to permit the plaintiff to trace the money, but it was sought to show that the money was deposited, and to show the circumstances of the transaction. We think there is no merit in this contention. There was no effort made to change the terms of the certificate. Nobody denied that the certificate properly stated that Misner deposited the money, but it was sought to show that the money belonged to the plaintiff, and the certificate did not state that the money was Misner's. The contract of the defendant did not provide for the payment of the money to Misner in any contingency.

Lastly, it is urged that the court erred in admitting the testimony by deposition of Albert A. Cohn, the president of the plaintiff company. The notice of the taking of this deposition did not state the name of the official before whom it was to be taken, but stated that it would be taken "at the office of Nathan Loesser, Engineers' Bldg., in the city of Cleveland, in the State of Ohio, a notary public," etc. The deposition was taken and returned by one E. A. Reilander, a notary public. It appeared to have been taken at the Engineers' building, city of Cleveland, and that Nathan Loesser appeared as the attorney for plaintiff, and no one appeared for the defendant. When this depo-

sition was offered there was a motion by defendant's counsel to strike out the deposition and withdraw it from the jury for the reason:

"That the name of the notary public before whom it was taken as appeared by the notice was Nathan Loesser, and that the notary who took and returned it was E. A. Reilander, another and different person, and that the notary before whom it was to be taken appears in the deposition as attorney for the plaintiff—that is, that the notice was given to take the deposition in this manner before the attorney for plaintiff as notary public, who was not a disinterested person, and who was attorney and counsel in the case.

"*The Court:* You had notice that this deposition was returned, didn't you?

"*Mr. Soule:* Yes, your honor.

"*The Court:* You did not make any written objections to it after its return?

"*Mr. Soule:* No.

"*The Court:* All right, your motion will be denied.

"*Mr. Soule:* We claim it is jurisdictional."

Our attention is called to the provisions of sections 12494 and 12497, 3 Comp. Laws 1915. Objections to notices, and to the manner of taking, certifying and returning depositions, will be waived unless made within the statutory time, and noticed for hearing, as provided by Circuit Court Rule No. 37. We think that, no objection having been made within the ten days required by the statute last cited, the same should be regarded as waived, and there was no error in the ruling here complained of. *Simonds* v. *Cash,* 136 Mich. 558, 564.

We are also of the opinion that, it being undisputed that the plaintiff furnished the money here in question, and there being no evidence that it belonged either to Jacobs or Misner, the trial court might properly have directed a verdict for the plaintiff, without receiving in evidence the deposition of Cohn. The assignments of error upon that subject therefore be-

come unimportant. *Thomas* v. *Bush*, 200 Mich. 224, 227.

We find no reversible error in the record, and as none of the errors complained of have resulted in a miscarriage of justice, the judgment below is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

SMITHMAN *v.* GRAY.

1. JUDGMENTS—FOREIGN JUDGMENTS—JURISDICTION—IMPEACHMENT.
   In a suit upon a foreign judgment, that judgment may be impeached for lack of jurisdiction in the foreign court, irrespective of the recital of jurisdiction contained in the record of judgment.

2. SAME—WARRANT OF ATTORNEY TO CONFESS JUDGMENT.
   A warrant of attorney to confess judgment contained in a promissory note must be strictly construed.

3. SAME—ASSIGNMENTS.
   Under the later decisions of the Pennsylvania courts, a warrant of attorney to confess judgment couched in unlimited terms may be exercised in favor of the assignee.

4. BILLS AND NOTES—PLEADING—PAYMENT—ISSUES.
   In an action upon a foreign judgment upon a note, where defendant's plea set up that at the time said note was taken up and paid, instead of having it canceled the payee caused it to be assigned to plaintiff, and during the trial offered to prove same, the question of payment was in issue.

5. SAME—JUDGMENT—DEFENSES.
   In such action, the defense that the note was paid, and

instead of being canceled was fraudulently assigned, is available.

Error to Wayne; Gage, J., presiding. Submitted June 18, 1918. (Docket No. 18.) Decided September 28, 1918.

Assumpsit by John B. Smithman against Edward Gray on a foreign judgment. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Lucking, Helfman, Lucking & Hanlon, for appellant.

Robert M. Brownson (*Frederick S. Baker,* of counsel), for appellee.

Plaintiff herein obtained a judgment against defendant in the sum of $9,346.54 upon a directed verdict. His action was based upon a Pennsylvania judgment for $8,390 dated July 3, 1915. The exemplification of record of said judgment shows that the same was procured in the Pennsylvania court upon the following note and warrant of attorney:

"$6,000.00. Due Dec. 21, Oil City, Pa. Oct. 22, 1909.

"Sixty days after date for value received I promise to pay to the order of the Riverside Engine Co. Six Thousand Dollars without defalcation, at the Citizens Banking Company of Oil City, Pennsylvania, and hereby empower any attorney of record to confess judgment against us for said sum, together with five per cent. attorney's fees for collection and all costs, waiving all exemption laws and stay of execution; and if levy be made on real estate, do waive the right of inquisition, and agree to the condemnation thereof, with authority to sell the same on *fi. fa.* with release of all errors. We further agree to any extension of this note without notice.

"60 Shares Stock. EDWARD GRAY (Seal)

"Address,

"Riverside Engine Co. (Seal)"

This paper bore the following indorsements:

"OIL CITY, PA., Oct. 22, 1909.

"For value received, Riverside Engine Co. assign this note to the Citizens' Banking Company, or order, and agree to pay the same if not paid at maturity by the maker hereby waiving exemption of property, the right of inquisition, demand, notice of nonpayment, protest, etc., and do hereby confess judgment for the amount of the within note, with interest, cost of suit and 5 per cent. for collection of same, and without stay of execution.

"RIVERSIDE ENGINE CO.,
"A. F. SMITHMAN, Treas."

"OIL CITY, PA., Jan. 21, 1910.

"For value received the within note is hereby assigned without recourse to Jno. B. Smithman.

"CITIZENS' BANKING COMPANY,
"FRED C. MCGILL, Cashier."

Under plea of general issue defendant gave notice of the following defenses:

"1. The defendant will show that the note and obligation upon which judgment mentioned in plaintiff's declaration was obtained, if signed by defendant, is a note payable to the Riverside Engine Company, executed by defendant and delivered to said payee for the accommodation of plaintiff and said payee and without payment of any consideration whatsoever to defendant therefor; that it was given by defendant and received by said payee upon the express understanding and condition that said Riverside Engine Company and plaintiff would protect defendant against the enforcement of any liability on the part of defendant to pay said note, and that whenever payment of same should be demanded by any holder thereof, it, the payee or said plaintiff, would take up, pay and cause said note and obligation to be canceled, of all of which facts and circumstances the plaintiff herein at and before his acquisition of said note had actual knowledge; that defendant was induced to sign same by the fraud of the plaintiff and said payee in representing to defendant that plaintiff and said payee then

had no intention of enforcing payment of said note against defendant, which said representations were false to the knowledge of plaintiff and said payee in that they then intended to enforce payment of said note by defendant; that at the time said note was taken up and paid instead of having said note canceled said payee and plaintiff caused the same to be assigned and transferred to plaintiff herein and thereafter said plaintiff, without notice to defendant, and with knowledge that said note was no longer the valid obligation of defendant, fraudulently caused the judgment in plaintiff's declaration mentioned to be procured; that more than six years elapsed after said note matured and before said judgment was obtained.

"2. Defendant will show that he was not served with process in the suit in which the judgment mentioned in plaintiff's declaration was obtained; that he did not appear in said suit in person or by attorney; that the alleged attorney who purported to appear for this defendant was not duly authorized so to appear; that at the time said suit was instituted and judgment recovered, he was not a resident of the State of Pennsylvania nor present within said State or within the jurisdiction of the court of common pleas of Crawford county; that said warrant of attorney in said note contained, if executed by defendant, is indefinite in terms and insufficient to authorize a confession of judgment against defendant, that the proceedings thereon in said court of common pleas did not comply with the law and statutes of Pennsylvania in that behalf provided, and that said court never acquired jurisdiction of the person of this defendant and that said purported judgment is void as against this defendant.

"3. Defendant will show that the alleged judgment, more particularly described in the declaration heretofore filed in the above entitled cause deprives this defendant of life, liberty and property without due process of law and therefore violates the terms of the Fourteenth Amendment to the United States Constitution."

Plaintiff offered in evidence the exemplification of judgment which was received over the following objections interposed on behalf of the defendant:

"1. That the power of attorney contained in the note is not negotiable.

"2. On the ground that the note itself is not negotiable under the Pennsylvania laws.

"3. On the ground that the power of attorney does not pass with the transfer of the note.

"4. On the ground that there is no proof that the plaintiff, in Pennsylvania, was a *bona fide* holder.

"5. On the ground that the warrant of attorney contained in the note sued upon is not a valid warrant of attorney in that it was too indefinite in its terms.

"6. That the warrant of attorney contained in the note is not a valid warrant of attorney in that it does not state in whose favor the judgment might be entered, and particularly is invalid in this case because it does not authorize the entry of the judgment in favor of the assignees of the note in question.

"7. That under the note and warrant of attorney there was no authority in the court of the State of Pennsylvania, and it did not have jurisdiction or right to enter up judgment in favor of the plaintiff in question because the warrant of attorney did not in terms run for the benefit of plaintiff.

"8. On the ground that the attorney acting in the case was not the attorney of the defendant.

"9. That it does not appear that the defendant was served or had notice of suit.

"10. On the ground that more than six years have elapsed since the maturity of the note.

"11. That judgment taken is void on its face, and is void as contrary to due process of law under the Constitution of the United States, and the making and obtaining of that judgment was not with due process as guaranteed to the defendant by the United States Constitution and the amendments thereto."

The defendant was placed upon the stand by plaintiff, and, being examined under the statute, testified that he was a resident of Pennsylvania at the time the paper in question was executed. On cross-examination by his own counsel he was permitted to testify that he had never been served with any process or

given any notice in the suit in connection with the note involved in the judgment. His testimony to the effect that he had never authorized any attorney to appear for him in any court in the State of Pennsylvania was excluded. Later in the course of the trial when plaintiff was on the stand and under examination by defendant's counsel and after certain evidence had been excluded by the court the following occurred:

"*Mr. Hĕlfman:* Well, now let the record—will your honor let the record show that I offered to prove each and every one of the facts set forth in our special defenses, and I don't want to go counter to your ruling.

"*The Court:* Any objection to that course?

"*Mr. Brownson:* Of his offer?

"*The Court:* Yes.

"*Mr. Brownson:* No, I cannot control that. He has offered to prove it, and I would make the same objection to each one of his offers.

"*The Court:* All right.

"*Mr. Helfman:* What I want to know is, shall I go through every one of these facts and try to prove that?

"*The Court:* I think not. I think you have no right to prove them under the pleadings in the case.

"*Mr. Helfman:* That is, we cannot prove any of the facts?

"*The Court:* I think not. I think you are estopped by that.

"*Mr. Helfman:* Your honor, will it be understood then that we have an objection?

"*The Court:* Sure.

"*Mr. Helfman:* And exception to your honor's exclusion of every fact—the offer of proof of the facts set up in my plea.

"*The Court:* Yes, I think so, to the acts of the court in refusing to permit you what you offer to prove.

"*Mr. Helfman:* It will be considered as if I had offered it and it had been excluded.

"*The Court:* Yes, sir."

Defendant thereupon moved for a directed verdict

substantially upon the same grounds advanced for the exclusion of the exemplification of judgment, which motion was denied and a verdict was directed in favor of the plaintiff for the amount of the Pennsylvania judgment with interest.

BROOKE, J. (*after stating the facts*). When a suit upon a foreign judgment is brought in the courts of this State that judgment may be impeached for lack of jurisdiction in the foreign court to render the same; irrespective of the recital of jurisdiction contained in the record of judgment. *Marshall* v. *R. M. Owen & Co.*, 171 Mich. 232; *Farrow* v. *Protective Ass'n*, 178 Mich. 639. It is asserted by the appellee that the appellant is precluded from interposing such affirmative defenses as are raised by his plea, citing *Mutual Fire Ins. Co.* v. *Furniture Co.*, 108 Mich. 170 (34 L. R. A. 694, 62 Am. St. Rep. 693); *Dunlap* v. *Byers*, 110 Mich. 109. There can be no doubt, however, that any defense which goes to the jurisdiction of the court pronouncing the foreign judgment may be urged collaterally.

In the case of the *First Nat. Bank of Danville* v. *Cunningham*, 48 Fed. 510, it is said:

"Assuming that the judgment was void for want of jurisdiction over the defendant, three remedies were open to him: He could make application to the court rendering the judgment to set it aside; or he could invoke the aid of a court of equity to restrain its enforcement and to vacate it (*Landrum* v. *Farmer*, 7 Bush. [Ky.] 46; *Caruthers* v. *Hartsfield*, 3 Yerg. [Tenn.] 366 [24 Am. Dec. 580]; *Johnson* v. *Coleman*, 23 Wis. 452 [99 Am. Dec. 193]; *Connell* v. *Stelson*, 33 Iowa, 147), or he could await suit thereon, and attack its invalidity collaterally. Until there was some adverse action against him on the question, he could not be estopped from taking each of the foregoing remedies. The abandonment of either or both of the first two modes of attack by leave of court, before

adverse action on the question, would not estop or preclude him from adopting the third mode, by way of defense attack, as has been pursued in this case."

It is settled law that a warrant of attorney to confess judgment contained in a promissory note must be strictly construed. *First Nat. Bank of Danville* v. *Cunningham, supra; National Exchange Bank* v. *Wiley,* 195 U. S. 257 (25 Sup. Ct. 70). So construed it is the contention of the appellant that the power of attorney here under consideration did not authorize confession of judgment in favor of a remote assignee of the note. In support of this proposition much reliance is placed upon the case of *Overton* v. *Tyler,* 3 Pa. St. 346 (45 Am. Dec. 645), where it is said:

"A warrant to confess judgment, not being a mercantile instrument, or a legitimate part of one, but a thing collateral, would not pass by indorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee for the benefit of his transferee. I am unable to see how it could authorize him to enter up judgment, for the use of another, on a note with which he had parted."

We are of opinion that under the later decisions of the Pennsylvania courts the decision announced in *Overton* v. *Tyler, supra,* has been repudiated and that a warrant of attorney couched in unlimited terms may be exercised in favor of the assignee, where, as in the case at bar, the note is made payable *to the order of* the payee and was assigned by the payee to the Citizens' Banking Co., or order, and later assigned by the banking company to the plaintiff. See *Cooper* v. *Shaver,* 101 Pa. St. 547; *Vietor* v. *Johnson,* 148 Pa. St. 583 (24 Atl. 173); *Champlin* v. *Smith,* 164 Pa. St. 481 (30 Atl. 447); *Fritz* v. *Morten,* 243 Pa. St. 187 (90 Atl. 58).

Defendant by his plea set up:

"That at the time said note was taken up and paid instead of having said note canceled said payee and plaintiff caused the same to be assigned and transferred to plaintiff herein and thereafter said plaintiff, without notice to defendant, and with knowledge that said note was no longer the valid obligation of defendant, fraudulently caused the judgment in plaintiff's declaration mentioned to be procured; that more than six years elapsed after said note matured and before said judgment was obtained."

—and in the course of the trial offered,

"to prove each and every one of the facts set forth in our special defenses."

Fairly construed, we think the plea and this offer put in issue the question of payment. Assuming then that the note in question was paid and as charged in the plea instead of being canceled and destroyed was fraudulently assigned to the present holder thereof, can that defense be urged in the present suit upon the judgment. In the case of *First Nat. Bank of Danville* v. *Cunningham, supra,* the action was in Kentucky on an Illinois judgment. The defense was that the note itself had been paid and its payment was fraudulently concealed from the Illinois court. The court said:

"It admits of no question that the warrants of attorney attached to the several notes sued on in the Illinois court were only made to secure the payment of such notes; that they were 'irrevocable' only while the notes remained unpaid; and that, upon the payment and discharge of said notes, the authority conferred by said warrants of attorney thereby ceased and terminated, both in fact and law, especially as against a holder of the notes who knew the fact that such notes were satisfied and discharged. No other construction can properly be placed upon said warrants of attorney, which, in dispensing with notice and all opportunity to be heard by the makers thereof, the courts treat with little favor—interpret strictly—and require to be followed to the letter of the powers conferred."

See, also, *National Exchange Bank* v. *Wiley*, *supra*, at page 268.

It appears from the affidavit of the defendant filed in support of a motion for a new trial that in 1911 the Riverside Engine Co., the payee of the note in question, was consolidated with another business owned by one A. A. Holbeck under the name of the Holbeck-Riverside Gas Power Company and it is asserted that the new company took over all the assets and assumed all the liabilities of the Riverside Engine Co. It is further asserted in said affidavit that plaintiff told defendant that all the obligations of the Riverside Engine Company on which defendant was liable had been fully paid and that there were no outstanding claims of any kind against defendant. Under the authorities cited we are of opinion that the court should have permitted defendant, if able, to show payment of the note and if such payment was shown beyond question to have directed a verdict in favor of the defendant.

Judgment is reversed and a new trial ordered.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

SMITHMAN v. GRAY.

This case is ruled by *Smithman* v. *Gray*, *ante*, 317.

Error to Wayne; Gage, J., presiding. Submitted June 18, 1918. (Docket No. 17.) Decided September 28, 1918.

Assumpsit by Howard H. Smithman against Edward Gray on a foreign judgment. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Lucking, Helfman, Lucking & Hanlon, for appellant.

Robert M. Brownson (*Frederick S. Baker*, of counsel), for appellee.

STEERE, J. This case is conceded both in the record and briefs of counsel to be identical in material facts and controlling questions with *Smithman* v. *Gray*, *ante*, 317. Each is an appeal from a judgment in the Wayne county circuit court upon directed verdict against defendant Edward Gray, based on a Pennsylvania judgment without personal service rendered by the court of common pleas for Crawford county upon an assigned note, with power of attorney, given to the Riverside Engine Co. by Gray. Like defense is sought to be made and the same course was pursued in each case. The controlling issue in both cases is the right to question the jurisdiction of the court rendering the foreign judgment. The opinion in that case disposes of this, and for the reasons there stated this judgment must be reversed and a new trial granted defendant.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WAGNER *v.* WAGNER.

DIVORCE—EXTREME CRUELTY—REFUSAL TO COHABIT—DESERTION—STATUTORY PERIOD.

Where the parties to divorce proceedings were less than 20 years of age, and after less than two months of married life the wife returned to her parents, refusing to live with the husband, his bill for divorce on the ground of extreme cruelty in refusing to cohabit was properly denied; the case made being one of desertion, which has not continued for the statutory period.

Appeal from Kalamazoo; Weimer, J. Submitted June 6, 1918. (Docket No. 58.) Decided September 28, 1918.

Bill by Donald Wagner against Lovina Wagner for a divorce. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Lincoln H. Titus, for plaintiff.

BIRD, J. The parties to this action are young people. They were married at Kalamazoo on October 8, 1917, when less than 20 years of age. They lived together in that city from the time of their marriage until the first day of November, 1917, when defendant deserted the plaintiff and went to live with her relatives. Plaintiff made an effort to get her to return but she refused, stating at one time that Kalamazoo was too small a town for her, and on another occasion saying she would never live with him. Plaintiff, concluding that it would be of no avail to make a further effort to have her return, filed his bill for divorce through his next friend, charging her with extreme cruelty for her refusal to cohabit with him. Personal service was had upon the defendant but she made no defense

See notes in 14 L. R. A. 685; 39 L. R. A. (N. S.) 1118; L. R. A. 1915B, 772.

and the bill was taken as confessed. The matter came on to be heard before the chancellor and after hearing the proofs he was of the opinion that the facts did not present a case within the definition of extreme cruelty, and therefore dismissed the bill.

Plaintiff has appealed to this court, insisting that the refusal of defendant to cohabit with him constitutes extreme cruelty within the holdings of this court, and especially within the holding of *Case* v. *Case,* 159 Mich. 491. The rule which prevails throughout most of the States is that a refusal to cohabit will not constitute extreme cruelty. There seems to be some exceptions, however, to this rule and our own cases are cited among the exceptions. An examination of the Michigan cases, however, will show that it is only after the refusal to cohabit has been persisted in for some considerable time that it will constitute extreme cruelty or when such refusal has been aggravated by other acts amounting to cruelty. *Case* v. *Case, supra; Campbell* v. *Campbell,* 149 Mich. 147 (119 Am. St. Rep. 660); *Whitaker* v. *Whitaker,* 111 Mich. 202; *Menzer* v. *Menzer,* 83 Mich. 319 (21 Am. St. Rep. 605); *Donaldson* v. *Donaldson,* 134 Mich. 291. See 9 R. C. L. p. 350.

The case of *Murnan* v. *Murnan,* 128 Mich. 680, is evidence that this court never intended to lay down a rule that a mere refusal to cohabit would amount to extreme cruelty. In this case the failure to cohabit was the only act complained of and it had been persisted in for ten months. It was insisted in this court that the case of *Whitaker* v. *Whitaker, supra,* justified the granting of a decree therein. In response to this contention it was said:

"The opinion in *Whitaker* v. *Whitaker* is a brief one and does not undertake to set out the facts disclosed by the record. In that case the defendant, during the entire period of her married life, refused to

cohabit with her husband. She insisted upon having all the privileges of a new relation without assuming its duties. No such case is here shown. We think the circuit judge properly dismissed the bill of complaint."

While no rule has been laid down by this court, how long the refusal to cohabit must be persisted in before it becomes extreme cruelty, the cases in which the principle has been applied are cases where the failure to cohabit has been persisted in for a long period of time and usually in cases where other cruelties were alleged and proven. In the instant case the parties lived together less than two months. No other cruelty is alleged. To hold that plaintiff is entitled to a decree on the ground of extreme cruelty would be doing violence to the case of *Murnan* v. *Murnan*. The case was rightly decided by the chancellor.

The decree must be affirmed.

FELLOWS, J., concurred with BIRD, J.

OSTRANDER, C. J. I think the case made is one of desertion which has not continued for the statute period. I therefore agree to affirmance of the decree.

MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred with OSTRANDER, C. J.

ATTORNEY GENERAL, *ex rel.* COMMON COUNCIL OF THE CITY OF DETROIT, *v.* MARX.

1. MANDAMUS—QUO WARRANTO—TITLE TO OFFICE—PROPER REMEDY—REVIEW.

   On certiorari to review mandamus proceedings to compel the mayor and board of education of the city of Detroit to fill alleged vacancies on the latter board, the Supreme Court will decide the questions presented which are of great public interest, they having been fully briefed and argued, although quo warranto and not mandamus is the usual and proper remedy.

2. SAME.

   The mere fact that in mandamus proceedings the question of title to office is incidentally involved will not necessarily render that remedy an improper one.

3. SCHOOLS AND SCHOOL DISTRICTS—CITIES—SINGLE SCHOOL DISTRICT—STATUTES—CONSTRUCTION.

   Act No. 251, Pub. Acts 1913 (2 Comp. Laws 1915, § 5867 *et seq.*), providing "that the board of education of any city having a population of 250,000 which comprises a single school district shall consist of seven school inspectors," applies to the city of Detroit; "single" signifying "principal" or "dominating" and not one; and "comprises" being a synonym of "embrace"; although the city in its rapid growth from time to time enlarged its territorial limits by taking in territory which did not immediately go into the school district, and also territory was taken into the school district which was not within the limits of the city.

4. STATUTES—CONSTRUCTION—INJUSTICE.

   A statute should not be given a construction which would create hardship and injustice if it can be avoided.

Certiorari to Wayne; Mandell, Williams, and Gilday, JJ. Submitted June 11, 1918. (Calendar No. 28,409.) Decided September 28, 1918.

Mandamus by the Attorney General, on the relation of the common council of the city of Detroit, to

compel Oscar B. Marx, mayor of the city of Detroit, and the board of education of the city of Detroit, to fill alleged vacancies on the board of education. From an order denying the writ, plaintiff brings certiorari. Affirmed.

Walter C. McNiel, for appellant.

Donnelly, Hally, Lyster & Munro (*Divie B. Duffield* and *Edmund Atkinson,* of counsel), for appellees.

KUHN, J. There is no public activity which more intimately affects the welfare of the community than that of its schools and means of education. As in all the communities of our State, the citizens of the city of Detroit have been keenly alive to the necessity of safeguarding and improving the education of their children. As a result, after years of agitation and discussion, a law providing for the present small school board to control and dominate educational matters was adopted. It is imperatively necessary, in order that this work can be carried on, that the legal status of this board be finally established. If questions concerning the right of its members to hold office can be urged, it is obvious that it becomes impossible for them to raise the necessary funds by bonding or otherwise to carry on this most important public service. In this proceeding it is urged that the present seven school inspectors, elected according to the provisions of said Act No. 251, Public Acts of 1913 (2 Comp. Laws 1915, § 5867 *et seq.*), were and are mere usurpers and their acts are absolutely null and void *ab initio.* In my opinion this situation presents a question of such great public importance that this court should finally decide the question presented upon the record now before us and finally fix the legal status of this board as to their right to hold office. It is true that proceedings in quo warranto might

have been instituted and that it has been held that mandamus is not the usual and proper remedy. This court has, however, at times, under similar conditions, waived the question of practice and has decided the questions presented when they have been fully briefed and argued, as has been done in this case. This, I think, we should now do. See *Lawrence* v. *Hanley,* 84 Mich. 399; *Lichtig* v. *Saginaw Circuit Judge,* 180 Mich. 667. Moreover, in this proceeding the principal contention was not a contention for title to office, except as that contention is incidental to the controversy that has arisen. On one side it is contended that the act creating the seven-member school board had no application to Detroit, because Detroit is not a single school district. On the other side it was contended that the act did have application to Detroit because, within the meaning of the act, Detroit was a single school district. There is authority in this State for the proposition that the mere fact that the application for a writ of mandamus incidentally involves the question of title to office, will not necessarily render the remedy an improper one. See *People, ex rel. Mead,* v. *Treasurer of Ingham Co.,* 36 Mich. 416; *Smith* v. *Eaton County Sup'rs,* 56 Mich. 217; *Ketcham* v. *Wagner,* 90 Mich. 271; *Huntley* v. *Finley,* 1180 McGrath's Mandamus Cases; *Wayne County Road Com'rs* v. *Board of Auditors,* 148 Mich. 255.

The judges who heard the matter in the court below were of the opinion that it is now too late to question the validity of the legislation, as in their opinion the questions here raised are foreclosed by the decision of this court in *Burton* v. *Koch,* 184 Mich. 250, and two decisions of the circuit court, which were accepted by the community at large as settled law. In the case of *Burton* v. *Koch, supra,* in the majority opinion sustaining the validity of this act, it was said with reference to the act:

"The expressed purpose is that, in districts co-extensive with a city having a population of 250,000, or more, the board of education shall consist of seven members elected at large by the electors of the whole district qualified to vote for school inspectors."

Now it is urged that at the time the question of whether or not said Act No. 251, Public Acts of 1913, should become effective in said school district of Detroit was submitted on November 7, 1916, the said city of Detroit did not comprise a single school district and (in the language of *Burton* v. *Koch, supra*) said school district of Detroit was not co-extensive with the said city of Detroit. This is based upon the fact that as the city in its rapid growth from time to time enlarged its territorial limits, it took in limited territories which did not immediately go into the school district, and also, as the school district was enlarged, very limited territory was also taken into the district which was not within the territorial limits of the city of Detroit.

The first section of the act in question reads as follows:

"The board of education of any city having a population of two hundred fifty thousand or over which comprises a single school district shall consist of seven school inspectors who shall be elected at large by the electors of the whole city qualified to vote for school inspectors in such municipality." * * *

The contention here urged by the plaintiff is that it was the purpose of the legislature in passing the act in question to make it apply only to cities having a population of 250,000 or over, wherein the board of education exercises jurisdiction in territory that was *co-extensive* and *coterminous* with the principal municipality. While such a construction of the legislation is possible, it is not in my opinion the natural construction which the words necessarily require. I agree with the contention of counsel for the defend-

ants that the word "single," as used in the act, should be held to signify "principal" or "dominating" and not "one." Plaintiff further contends that the word "comprises" means mutually inclusive and exclusive. I do not think it should be held to so mean, as in the ordinary meaning of the word it is held to be a synonym of the word "embrace." *De Nobili* v. *Scanda,* 198 Fed. 341. The city of Detroit has always had one dominating school district and at no time have there ever been two complete school districts within its borders. There have been only parts of other school districts in the outlying sections. It has comprised at all times a single school district. These outlying portions of districts have come in as the territorial limits have been expanded, and have been gradually brought into the school district as the conditions with reference to the territorial limits of the municipality and the school district were gradually adjusted in accordance with the provisions of law. The construction which the plaintiff asks for would create a hardship and injustice, which, under the rules of construction, should not be given to a statute if it can be avoided. In 2 Lewis' Sutherland Statutory Construction (2d Ed.), § 490, it is said:

"Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to public interests."

All the other questions, in my opinion, as to the validity of the legislation are finally determined by our decision in *Burton* v. *Koch, supra.*

For these reasons I think that the order denying the writ should be affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

LIVESAY *v.* EAST SIDE CREAMERY CO.

1. PRINCIPAL AND AGENT—STATEMENTS OF AGENT—ADMISSIONS—WITNESSES.
   While it is not competent to show statements and admissions of an agent to establish his agency, he may testify to the fact of his agency; he being as competent upon that question as the principal would be.
2. SAME—EVIDENCE—SUFFICIENCY.
   Evidence, although conflicting, *held*, sufficient to sustain the finding of the trial court that agency was established.
3. SAME—NEW TRIAL—GREAT WEIGHT OF EVIDENCE.
   Held, that the verdict was not against the weight of the evidence.

Error to Lenawee; Hart, J. Submitted January 30, 1918. (Docket No. 70.) Decided October 7, 1918.

Assumpsit by Frank M. Livesay against the East Side Creamery Company for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Affirmed.

Edward D. Devine, for appellant.

Herbert R. Clark and *Henry I. Bourns*, for appellee.

BIRD, J. From a finding of facts by the trial court it appears that for several months prior to September 15, 1915, defendant purchased milk from one Guy R. Skidmore, of Jasper, who in turn purchased it from the farmers in that vicinity. Some disagreement arose between Skidmore and the farmers in September, 1915, and it looked as though they, or some of them, would refuse to make further deliveries to him. This coming to the attention of defendant, Mr. Paul Roggebamb, general manager of defendant, went to the Jasper creamery, where Skidmore had been re-

ceiving the milk, and arranged with George Delano and Frank Skinner, who were in charge of the creamery, to say to the farmers that if they would continue to deliver the milk to the Jasper creamery the defendant would pay them direct for all milk delivered after September 15th, at the rate of $1.30 per hundred. In pursuance of this arrangement Delano and Skinner conveyed the information to the farmers and as a result thereof they continued to deliver their milk at the Jasper creamery and Delano and Skinner in turn shipped the same to defendant. After milk had been delivered under this arrangement amounting to nearly $1,000 demand was made for payment. Defendant refused to pay, claiming that it had purchased the milk from Skidmore and paid him for it. Plaintiff thereupon, on behalf of himself and as assignee of other farmers who delivered milk, brought this suit to recover the amount due. A trial was had before the court without a jury and resulted in a judgment for plaintiff in the sum of $943.53. Exceptions to the conclusions of law and fact were duly filed by defendant.

1. Counsel contends that the trial court was in error in finding that a contract was made between defendant and plaintiff. The testimony of Delano and Skinner is direct and positive that such an agreement was made with the farmers through them. That after the 15th of September they received the milk from the farmers and forwarded it to defendant. The fact of delivery was corroborated by Mr. William Bradish, the station agent of the Detroit, Toledo & Ironton Railway Company at Madison. It is true that Mr. Roggebamb denied that he made the arrangement but does not deny that defendant received the milk. It is also claimed that Skidmore was paid for the milk under its contract with him. This appears to be denied

by Skidmore. The testimony on this phase of the case was in conflict and we think fully sustains the finding of the trial court.

2. But counsel says there was no competent proof that Roggebamb had authority to bind defendant to such an agreement, and the contention is made that Roggebamb's testimony to the effect that he had authority as general manager to purchase milk for defendant was incompetent. No rule of evidence was violated by permitting him to testify that he was the general manager of defendant, and as such officer had the authority to, and did, purchase milk for defendant. The case of *Logan* v. *Agricultural Society*, 156 Mich. 537, and other similar cases are cited to the effect that agency cannot be proved by the declaration of the agent. This is a well recognized rule, but it does not apply to this situation. It was not competent to show statements and admissions of Roggebamb to establish his agency, but because that is true it does not follow that Roggebamb himself may not testify to the fact of his agency. He is as competent a witness upon that question as his principal would have been. 31 Cyc. p. 1651; 1 Mechem on Agency (2d Ed.), § 292; *Cleveland Co-operative Stove Co.* v. *Mallery*, 111 Mich. 43; *Spears* v. *Black*, 190 Mich. 693.

3. It is also contended that the agency of Delano and Skinner is not made to appear by competent evidence. It appears that Roggebamb had the authority to make the arrangement with them, and it appears from their testimony that he did make the arrangement. This would justify the conclusion reached by the trial court that Delano and Skinner were the agents of defendant.

4. Witnesses Melner, Cross and Alcock, farmers with whom Delano and Skinner made the arrangements to continue bringing their milk in pursuance of the instructions of Roggebamb, were permitted to tes-

tify to the fact that the arrangement was made with them. This was competent as showing that Roggebamb's instructions were carried out by Delano and Skinner and that the witnesses relied upon the defendant's promise to pay them for their milk.

5. The point is raised that the verdict is against the weight of the evidence. We cannot agree with this contention. The testimony which was offered to establish the making of the contract and the authority of those who made it was very persuasive and amply supports the conclusion reached by the trial court.

The judgment is affirmed.

MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

CLUGSTON v. ROGERS.

1. STATUTES—AMENDMENTS—PROCEDURE.
   In so far as a new statute merely provides for changes in the mode of procedure, it will not invalidate steps taken before it goes into effect, but will apply to all proceedings taken thereafter.

2. TAXATION—REDEMPTION—NOTICE—STATUTE—COMPLIANCE.
   Where notice of right to reconveyance of lands sold for taxes within six months after service of notice complied with Act No. 236, Pub. Acts 1903, in force when the notice was placed in the sheriff's hands for service, but before service Act No. 142, Pub. Acts 1905 (1 Comp. Laws 1915, § 4138), took effect, amending the former act by providing for reconveyance within six months after return of service of notice, and the notice by publication was not changed to conform to the amendatory act, the notice was insufficient.

3. SAME—NOTICE—BONA FIDE RETURN—STATUTE.
Evidence *held*, sufficient to sustain the conclusion of the court below that there was not such good faith effort on the part of the sheriff to make personal service on the persons entitled thereto as the law demands.

4. SAME—VOID TAX TITLE—RIGHT TO RECOVER FOR IMPROVEMENTS.
Where the tax title purchaser entered premises as a trespasser, he was not entitled to recover for improvements thereon, on failure of his title.

5. SAME—RIGHT TO RECOVER TAXES PAID.
Neither could he recover on account of taxes paid during his illegal occupancy, where they were more than offset by the benefits he had received from the premises.

Appeal from Alpena; Emerick, J. Submitted April 11, 1918. (Docket No. 67.) Decided October 7, 1918.

Bill by Elizabeth P. Clugston and others against Austin L. Rogers to redeem from the sale of land delinquent for taxes. From a decree for plaintiffs, defendant appeals. Affirmed.

Dayton W. Closser (*I. S. Canfield*, of counsel), for plaintiffs.

O'Brien & Francis, for defendant.

BIRD, J. Defendant Rogers purchased from the State on the 2d day of December, 1904, in 40-acre parcels, the north half (½) of the northeast quarter (¼), and the southwest quarter (¼) of the northeast quarter (¼) of section ten (10), town twenty-nine (29) north, range six (6) east, Alpena county, for the taxes of 1890, 1891, 1894, 1896-1900; also a tax deed of the land above described as one parcel for taxes of 1892, also certificate of purchase for taxes of 1901, and tax receipts for taxes of 1902 and 1903 paid as condition of said purchase. The total amount paid for said purchase being $306.63.

It was conceded that the government chain of title was in plaintiffs. This chain of title shows that at

the time defendant purchased the tax title, Edward K. Potter was the grantee in the last recorded deed in the regular chain of title of the north half of the northeast quarter, and that William Slee was the grantee in the last recorded deed in the regular chain of title of the southwest quarter of the northeast quarter.

On the 25th day of April, 1905, Rogers placed a notice of reconveyance in the hands of the sheriff of Alpena county for service. The sheriff retained the notice until July 1, 1905, when he made the following return:

"STATE OF MICHIGAN, } ss.
"COUNTY OF ALPENA, }

"I do hereby certify and return that I received the annexed notice of tax sale (Austin L. Rogers to estate of Edward K. Potter and estate of William Slee) on the 25th day of April, A. D. 1905, and that after careful inquiry I have been unable to ascertain the whereabouts or the postoffice address of the grantee named in the last recorded deed, or deeds, or the mortgagee named in all undischarged recorded mortgages, or the assignee of record of said mortgage of said premises, or of the heirs of said grantee or mortgagee or assignee, or whereabouts or the postoffice address of the executor, administrator, trustee or guardian of such grantee, mortgagee, or assignee, or of any of the heirs-at-law of the said estate of Edward K. Potter or of the estate of William Slee.

"Dated, this first day of July, A. D. 1905.

"ANTHONY PETERSON,
"Sheriff."

Service by publication followed and after the statutory period defendant took possession of the premises and has ever since been in the possession thereof.

Plaintiffs, in August, 1915, filed this suit to redeem said premises. At the hearing none of the deeds involved were questioned. The attack was made by plaintiffs upon the form of the notice of reconveyance

and on the service of the notice. The chancellor concluded that neither the form of the notice nor the service was legal, and a decree was made giving plaintiffs the right to repurchase upon payment of $628.26.

1. *The form of the notice.* The defendant placed the notice with the sheriff for service on April 25, 1905. The notice advised the persons addressed "that you are entitled to a reconveyance thereof at any time within six months after service upon you of this notice." This was in compliance with Act No. 236 of the Public Acts of 1903 then in force. While the sheriff was holding the notice for service, and on May 25, 1905, this part of the statutory notice was changed by amendment (Act No. 142 of the Public Acts of 1905, 1 Comp. Laws 1915, § 4138) to read:

"That you are entitled to a reconveyance thereof at any time within six months after return of service of this notice."

Notwithstanding this amendment no change was made in the notice for publication. It is claimed by plaintiffs that the failure to make the notice comply with the amendment invalidates it, citing *Closser* v. *Remley*, 195 Mich. 313. This case holds that a failure to incorporate into the notice the amended words renders it invalid. Defendant recognizes this but seeks to escape the effect of it by the fact that the notice was placed in the hands of the sheriff for service prior to the taking effect of the amendment. The amendment did not affect any substantial right of the defendant, neither did it deprive him of the existing remedy. It simply modified the mode of procedure. The rule in such cases is stated to be as follows:

"In so far, however, as the new statute merely provides for changes in the mode of procedure, it will not invalidate steps taken before it goes into effect, but will apply to all proceedings taken thereafter." 36 Cyc. p. 1216.

See, also, *Union County Com'rs* v. *Greene*, 40 Ohio St. 318; *Mayne* v. *Huntington County Com'rs*, 123 Ind. 132 (24 N. E. 80); *Weller* v. *Wheelock*, 155 Mich. 698.

This appears to be the general rule and we think it should be applied in this case. This amendment of the tax law had been in effect more than a month before the sheriff made his return and nearly two months before any attempt was made to make service by publication. Our conclusion on this point brings the case within the holding of *Closser* v. *Remley*, *supra*.

2. Considerable testimony was taken at the hearing bearing upon the good faith of the sheriff's return. In holding that the return was not a good faith return the chancellor said:

"Another, and a most serious contention made by plaintiffs is that the sheriff did not make the careful inquiry as to the whereabouts and postoffice address of the persons entitled to notice which the law requires. True it is, there is no direct evidence of the efforts and inquiries actually made by the sheriff in his attempts to learn such matters, or that he made no such effort or inquiries at all. But it must be such facts may be proved by indirect evidence. Suppose a sheriff today should return that he was unable to ascertain the whereabouts or postoffice address of Governor Sleeper, or of William T. Sleator, the mayor of the city of Alpena. Surely, the court, from the very prominence of certain individuals in a given community would be justified in finding as a fact that the officer had made no such careful, good faith inquiry as the law required.

"The holders of the last recorded deeds in the regular chains of titles of the lands involved in this case were Edward Kent Potter and William Slee. In 1905 both of these men were recently deceased, and the notice placed in the hands of the sheriff for service was directed to their respective estates. Mr. Potter was one of the most prominent of the pioneer citizens and business men of Alpena. For more than

twenty-five years he was a joint owner and operator of a large steam saw mill, situate on the river at the head of Washington avenue, in that city, and resided in a home on that street that was, and still is, a landmark of the town. Midway between the mill and home of Mr. Potter lived Christian Peterson, the father of the sheriff, Anthony Peterson, in a house at 912 Washington avenue, where the sheriff was born and always lived until he moved into the county jail upon his election to the office of sheriff. The elder Peterson was an employee of Mr. Potter for years in this mill, and during the later years of the active business career of Mr. Potter while he carried on business, associated with his two sons, Charles E. and William H. Potter, 2d, plaintiffs in this case, under the firm name of E. K. Potter & Sons, the sheriff himself was an employee of this firm in this same mill. He grew up a playmate and schoolmate in the old fourth ward school with all the Potter children, the plaintiffs in this case. After Mr. Potter's death, his widow and his five children removed to Los Angeles, in the State of California, and his children reside there still. Two brothers of Mr. E. K. Potter, James J. and John D. Potter, continued to reside at, and carry on one of the most extensive mercantile establishments in the city of Alpena, under the firm name of Potter Brothers. The location and residence of the plaintiffs after their removal to California and before was notorious in the city of Alpena and any inquiry at all made by Anthony Peterson would, if, indeed, he did not already know, have placed him in possession of full knowledge of the whereabouts and postoffice address of each of the Potter children, the plaintiffs in this case.

"And William Slee was another prominent citizen and business man of Alpena. In 1905 his estate was being administered in the probate court of Alpena county. His widow, Clara Matilda Slee, herself a well known resident of Alpena, was administratrix of his estate and the guardian of his minor children, by the order and decree of the same court wherein all these matters were of record. The notice itself was directed to the estate of William Slee and was ample notice to the sheriff that he would find just what he needed to know in the probate records of Alpena county. I

think it can be surely said that any inquiry, however slight, would also have given the sheriff complete knowledge as to the heirs and personal representatives of William Slee.

"Therefore, there was not the earnest effort made in good faith on the part of the sheriff to give plaintiffs actual notice of defendant's tax titles, which the law demands."

We have read the testimony bearing on this question and we fully concur in the conclusion reached by the chancellor. It may be easier to have the sheriff make a return on the notice and get service by publication where the heirs are numerous and badly scattered, but that course is not a compliance with the statute, neither is it the exercise of the diligence and good faith which the law demands. *Winters* v. *Cook,* 140 Mich. 483.

3. It is argued by defendant that if it shall be held that he is not entitled to possession of the premises he is entitled to recover for the improvements which he has made thereon. The chancellor overruled this contention, holding that as Rogers had entered the premises as a trespasser he was not entitled to recover for such improvements, citing *Corrigan* v. *Hinkley,* 125 Mich. 125; *Griffin* v. *Kennedy,* 148 Mich. 583; *Cook Land, etc., Co.* v. *McDonald,* 155 Mich. 175; *Morrison* v. *Semer,* 164 Mich. 208; *White* v. *Dunsmore,* 167 Mich. 542; *Powell* v. *Pierce,* 168 Mich. 427; *Closser* v. *McBride,* 182 Mich. 594.

The chancellor was also of the opinion that no recovery should be had on account of taxes paid by him during his illegal occupancy, expressing the opinion that they were more than offset by the benefits he had received from the premises.

We are of the opinion that the chancellor took the proper view of the questions involved. The decree will be affirmed, with costs to the plaintiffs.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

HILDIE *v.* ECKHART.

1. TAXATION—REDEMPTION—NOTICE—SUFFICIENCY.
   Where the notice to redeem from tax sale advised the owner that his land had been sold for taxes and that he could redeem within six months for a certain definite sum, the notice was not invalid because in giving the years for which sale was made one year was omitted, in the absence of a showing that he was prejudiced thereby.

2. SAME—NOTICE—RETURN.
   1 Comp. Laws 1915, § 4138, requiring that if the last grantee be a resident of any county other than that in which the land is situated, then the return as to such person shall be made by the sheriff of the county where such person resides, does not require that the return be made by the sheriff of a county where the grantee resided 22 years before, when the deed was executed, where, after diligent search, the whereabouts of said grantee could not be ascertained.

3. SAME—NOTICE TO HEIRS OF GRANTEE—PRESUMPTIONS.
   In the absence of information that the grantee was deceased, it was unnecessary for the sheriff's return to show that he was unable to locate her heirs; the lapse of 22 years after the date of her deed giving her residence being insufficient to warrant the presumption that she was deceased.

4. SAME—DESCRIPTION—GOVERNMENT DESCRIPTION—STATUTES.
   Under Act No. 9, Pub. Acts 1882, amending the tax law requiring assessing officers to follow the government description of land, and allowing it to be assessed by any description by which it might be known, land described in a way that could have been easily understood by the owner was a valid description.

5. SAME—HUSBAND AND WIFE.
   The rule preventing a husband from purchasing a tax title upon land of his wife is not applicable where the wife had been dead for three years, and the title had descended directly to her daughter.

6. SAME—REDEMPTION—NOTICE.

The record holder of a tax deed for the taxes of an earlier year is entitled to notice of redemption from a subsequent tax title purchaser.

Error to Ogemaw; Sharpe, J. Submitted April 16, 1918. (Docket No. 92.) Decided October 7, 1918.

Ejectment by Lundus A. Hildie against Morris Eckhart. Judgment for defendant. Plaintiff brings error. Reversed.

William T. Yeo, for appellant.

Harris & Chapin, for appellee.

BIRD, J. Plantiff brought ejectment to recover the possession of lot one (1) in section two (2), town twenty-three (23) north, range one (1) east, containing 51.75 acres. The land is situate on the north shore of Clear Lake in Ogemaw county. It is conceded that plaintiff is the last grantee in the regular chain of title from the government. Defendant relies on a tax deed for the years 1894-1898 and 1900, which was issued on March 15, 1905, by the auditor general, for which the grantee paid a consideration of $35.92. No question is raised as to the validity of this deed. Plaintiff, however, takes the position that no valid notice of reconveyance was ever served on him or his grantors, and he therefore concludes that he is entitled to the possession of the premises. Defendant, to meet this contention, shows that in January, 1908, Mary McKay, one of his grantors, caused a notice of reconveyance to be placed in the hands of the sheriff of Ogemaw county to be served on Orrintha F. Ellsworth, who was at that time the owner of plaintiff's title. The sheriff returned that he was unable to find Orrintha Ellsworth and substituted service was had by publication. After hearing the proofs the trial court reached the conclusion that the notice of reconveyance was valid, and therefore dismissed the suit.

1. The invalidity of the notice is asserted by plaintiff because it omitted to state one of the years for which the sale was made. The cardinal purpose of the notice is to apprise the party or parties to whom the notice is addressed that the premises have been sold for taxes and that they can repurchase them for a certain consideration within a stated time. We are unable to see how the owner in this case could have been better advised of these important facts. The notice in question advised him that his premises, describing them, had been sold for taxes, and that he could redeem them within six months for the sum of $76.92. The notice also stated the years for which the sale was made, but in doing so it omitted the year 1894. Had the notice imparted this additional information it would have placed him in no better position to protect his interest, as the redemption open to him was by paying an aggregate sum, not by paying each year's tax by itself. The fact that the sale included the 1894 taxes was a matter of record and payment of the amount demanded would have disclosed the information. While we have been inclined to insist upon a strict compliance with the statutory notice we think it would be a too rigid construction to hold that the notice is invalid for this reason. Where the sale is made for more than one year's taxes, the omission of one year ought not to invalidate the notice of reconveyance in the absence of a showing that the person entitled thereto has been prejudiced thereby.

2. Exception is also taken to the return of the sheriff as not being sufficient. As has been stated, Orrintha Ellsworth was the last grantee of record at the time the notice was served in January, 1908. She purchased the premises in the year 1886, and the deed which she received and which is of record, recites her residence as the city of Detroit. This appears to have

been the only information the sheriff had as to her residence. He followed this information and made a search for her in Detroit. In this he was assisted by the sheriff's force of Wayne county in examining city directories and making inquiries. Being unsuccessful in this attempt to locate her the sheriff left a copy of the notice with the sheriff's force in Wayne county. He heard nothing further from his search in Wayne county and was unable to find her elsewhere, or to ascertain her postoffice address, and he accordingly made a return to that effect.

The point made by counsel is that the sheriff of Wayne county should have made a return. He bases this contention upon the following provision of the tax law:

"*Provided*, That if the grantee or grantees, or the person or persons holding the interest in said lands as aforesaid, shall be residents of any county of the State other than the county in which the land is situated, then such return as to such person shall be made by the sheriff of the county where such person or persons reside." * * * 1 Comp. Laws 1915, § 4138.

It does not appear that the sheriff had information that Mrs. Ellsworth lived in Detroit except the information which he gathered from the deed made 22 years previously. He made the most of this information by an attempt, which appears to have been a good faith attempt, to locate her in the city of Detroit, but in this attempt he failed. We do not think the fact that the Wayne county sheriff assisted in making a search to learn whether she was a resident of Wayne county, would make it necessary for the sheriff of Wayne county to make a return of that fact. Had the investigation disclosed that she resided in Wayne county but could not be found therein it would then have been the duty of the sheriff of Wayne county to

return the fact. But it could hardly be expected that the sheriff of every county in which a search was made to learn whether she was a resident therein would be obliged to make a return that he was unable to find her.

It is further argued that the return should have shown that the sheriff was unable to locate her heirs. This would be unnecessary unless the sheriff had some information that she was deceased. The proofs fail to show that either he or any one else connected with the transaction had such information. Neither was the lapse of time so great after she purchased the premises that the sheriff would be expected to indulge the presumption that she was deceased.

3. During all the time that Orrintha Ellsworth owned the land it was delinquent for the taxes of 1885. Subsequent to her death and in 1893 M. H. Ellsworth, her husband, purchased a tax deed from the State of the north 40 acres of the tract, which was described as the northwest quarter (¼) of the southwest quarter (¼) of section two (2). Later Ellsworth joined with his daughter in conveying title to plaintiff's grantors. It is claimed by plaintiff that Ellsworth should have had notice of reconveyance, inasmuch as his tax deed was of record. Defendant replies to this contention that there is no such land in Ogemaw county as is described in the auditor general's deed to Ellsworth, and that such a description would be no notice to a tax deed purchaser that Ellsworth had any interest in the land in question. The basis of this contention is that the description of the premises for taxing purposes should have followed the government field notes and plat book and been described as lot one (1), section two (2), etc., containing 51.75 acres. This description was the result of meandering Clear Lake. The contention that this was an erroneous description finds support in the case

of *King* v. *Potter*, 18 Mich. 134, where a similar situation was under discussion. The opinion in that case was rendered in the year 1869 and was rested on the statute. The statute referred to is section 804, 1 Comp. Laws 1857, which made it incumbent upon assessing officers to follow the government description. At the session of 1882 (Act No. 9, Pub. Acts 1882), section 16 of the tax law was amended to read as follows:

"SEC. 16. The description of real property may be as follows, viz.:

"*First.* If the land to be assessed be an entire section, it may be described by the number of the section, township, and range.

"*Second.* If the tract be the subdivision of a section authorized by the United States for the sale of public lands, it may be described by the designation of such subdivision with the number of the section, township, and range.

"*Third.* If the tract be less or other than such subdivision, it may be described by designation of the lot or other lands by which it is bounded, or in some way by which it may be known.

"*Fourth.* In cases of lands platted or laid out as a town, city, or village, or as an addition to a town, city, or village, the same may be described by reference to such plat and by the number of the lots and blocks thereof, whether such plat be recorded or not.

"*Fifth.* When two or more parcels of land are used or occupied together, they may be assessed by one valuation.

"*Sixth.* Lands may be designated by any description by which they may be known."

Subdivision 6 was brought into our statutes by this amendment.

The taxes for the year 1885 were assessed after this amendment was passed. At that time it was permissible to designate lands for the purpose of assessment by any description by which they might be known. When this assessment was made there were

two ways which occur to us in which the land could have been described: Either the north forty (40) acres of lot one (1), section two (2), etc., or the northwest quarter (¼) of the southwest quarter (¼) of section two (2), etc. Either way would have been a reasonably familiar description and one that could have been easily understood by the owner. We are, therefore, of the opinion that the contention that this description was an erroneous description and rendered notice of reconveyance unnecessary must be overruled.

4. But it is further argued by defendants that Ellsworth could not become the owner of a tax title on lands owned by his wife's estate, thereby invoking the general rule which prohibits one from purchasing property at a sale for nonpayment of taxes whose legal and moral duty it was to pay the taxes, or one who stands in a fiduciary relation to the owner, citing the recent case of *Myers* v. *Myers*, 186 Mich. 220. The facts involved in this case do not appear to be within the general rule nor within the principle of *Myers* v. *Myers*. Without deciding the question whether Ellsworth would have been entitled to notice had this principle of law been applicable to his purchase, it may be said that, at the time Ellsworth made the purchase of this tax deed his wife had been dead for three years. She died in August, 1890, and he did not make the purchase until 1893. She died intestate, leaving one heir, a daughter. The title, upon the death of Orrintha, went directly to the daughter, and thereafter she was the owner. The question therefore which arises is one between the father and daughter rather than between the husband and his wife's estate. The record does not show whether the daughter was a minor at that time, but this is unimportant as Ellsworth's right to purchase the tax title as against his daughter is not questioned.

Ellsworth's deed was of record and its validity is

not questioned. We, therefore, conclude that he was entitled to the statutory notice. The failure to serve it makes it necessary to reverse the judgment. Plaintiff will recover his costs in this court.

STEERE, BROOKE, STONE, and KUHN, JJ., concurred with BIRD, J.

OSTRANDER, C. J. I concur in reversal. Mr. Ellsworth was entitled to notice because he was grantee in the tax deed, and the statute makes the giving him a notice imperative.

MOORE and FELLOWS, JJ., concurred with OSTRANDER, C. J.

CRANE v. VALLEY LAND CO.

1. WATERS AND WATERCOURSES—SURFACE WATERS—SERVITUDES—NATURAL DRAINAGE.

   The natural flowage of surface water from an upper estate is a servitude which the owner of the lower estate must bear, and he cannot hold it back by dykes or dam its natural channels of drainage to the injury of the owner of the upper estate.

2. EVIDENCE—SIMILAR CONDITIONS—FOUNDATION.

   In an action for damages for injury to plaintiff's standing timber and crops by obstructing his natural drainage, evidence of farmers as to their individual experience with their own land to support the defense that the crop failure was due to unfavorable seasons, without laying the proper foundation of similarity, was inadmissible.

3. NEW TRIAL—DISCRETION—ABUSE.
Refusal of plaintiff's unopposed motion for a new trial because of the court's action in striking out, of its own motion, in the midst of the charge, of legal documents introduced by plaintiff to refute defendant's contention that plaintiff had agreed to the construction of the dyke where located amounted to an abuse of discretion.

4. SAME—PLEADING—DILIGENCE—NEWLY-DISCOVERED EVIDENCE.
Where defendant's plea was the general issue with notice of the defense that plaintiff had consented to the dyke complained of as placed, plaintiff's failure to anticipate and prepare for the defense of high water on Lake Huron during the years involved was not an inexcusable lack of diligence, and a new trial should have been granted to enable him to present government data and newly-ascertained evidence material to a vital issue in the case.

5. TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS.
In an action for damages caused by the construction of a dyke, where defendant emphasized the fact that plaintiff was refused a temporary injunction, plaintiff was entitled to have the jury instructed, as requested, that the granting or not granting of a temporary injunction is no ground for action or defense.

Error to Saginaw; Miner, J., presiding. Submitted April 17, 1918. (Docket No. 107.) Decided October 7, 1918.

Case by Riley L. Crane against the Valley Land Company for damage to land by flooding. Judgment for defendant. Plaintiff brings error. Reversed.

Riley L. Crane (*Otto & Davis*, of counsel), *in pro. per.*

Arthur Otto (*E. L. Beach*, of counsel), for appellee.

STEERE, J. Plaintiff brought this action in the circuit court of Saginaw county to recover damages for injury to crops and standing timber during the years 1914-1916, from excessive water upon his 80-acre farm located in Kochville township, Saginaw county, caused

as he charges by certain dykes built by defendant obstructing his natural drainage. From an adverse verdict and judgment he has removed the case to this court for review claiming prejudicial error on various assignments.

Defendant is a Michigan corporation, with headquarters at Bay City, organized for the purpose of buying and reclaiming by dyking and draining certain marsh and overflowed land in the Saginaw valley lying immediately to the east and north of plaintiff's farm, between it and the Saginaw river.

Plaintiff's 80 acres is described as the E ½ of the S W ¼ of sec. 19, town 13 N, of range 5 E. It is located just east of the Michigan Central Railroad line between Saginaw and Bay City, in the lower portion of the Saginaw valley where the land is generally flat and near the water level, much of it to the east and north of the plaintiff's farm being, in its natural condition open marsh too low and wet for successful agriculture and, because of the water level, difficult to drain and reclaim. His farm is, however, as described by him without dispute, exceptionally high for that locality and sufficiently dry in its natural condition for cultivation, having formerly been "all wooded except about five acres at the south," with good natural drainage into a tributary of the Saginaw river called Davis creek. It is clay land with a black loam top soil and one of the pioneer farms of Saginaw valley, early settled upon, cleared and successfully cultivated for many years. With the exception of the 16-acre woodlot it had been a cleared and improved farm under cultivation since plaintiff first became acquainted with it in 1880. Attracted to it as a fertile and productive farm he purchased it in 1897, and thereafter successfully cultivated and cropped it, with a tenant in direct possession who continued for 20 years to work it on shares under plaintiff's direction, raising

annually and profitably good yields of the customary crops grown by farmers—such as wheat, corn, oats, beans, buckwheat, potatoes, sugar beets and the usual garden products, without failure until in 1914 when defendant in a project to reclaim the marsh land below him constructed and closed its dykes which, as he contends, so obstructed his former free drainage, soaked with seepage and flooded his land that thereafter trees in his woodlot died, his meadows and pastures deteriorated, and the cultivated fields, cropped and tilled in the same manner as formerly so far as possible, failed to produce in whole or part, as a result of which the crops and income from this farm were not to exceed one-half of normal in 1914 and one-fourth in 1915 and 1916.

Davis creek is a small tributary of the Saginaw river, navigable in the sense that it is boatable and a drivable stream for logs. Its general course is east and northerly, furnishing drainage for much of Kochville township lying to the west of plaintiff's farm, which the creek crosses near the south line flowing practically east to some twenty rods beyond his east line when it swings nearly north across section 19, furnishing his land drainage to the south and east, then runs more northeasterly through yet lower marsh lands for about one and one-half miles to where it joins the Saginaw river, which flows a northerly course varying easterly to its outlet in Saginaw Bay. Between plaintiff's farm and the Saginaw river, the land to the east and north was in its natural condition, open prairie and marsh, lower than his except an elevation called Calf island, subject to floods in high water, and portions so low as to be submerged by the normal water level. A tract of this marsh said to be about two miles in extent east and west and about four miles north and south lay in what is termed a basin partly submerged much of the year, and so

near on a level with Saginaw bay that the water upon it varied with the condition of wind and water level on the bay. Referring to this low territory east of plaintiff's farm defendant's engineer said:

"The north wind drives the water from Saginaw river into Davis creek. The water goes as high as the Saginaw river is. If the water raises a foot on the land it might raise and spread over half a mile. If it raises three feet it might go back a mile and a half to the west."

The soil of these low lands of the Saginaw valley are said to be largely lake clay, or the clayey portion of an ancient lake bed, known to be fertile and of high productivity when well drained. The purpose of defendant's organization was to purchase and reclaim these practically worthless marshes by a system of dredge cuts and enclosing dykes above high water mark, with a pumping station to drain the enclosed territory.

Actual work was begun upon this project in 1912, and while yet in its preliminary stages plaintiff, in anticipation of the result to his property, made inquiry, suggestions and protest against the work as planned. No adjustment being reached he filed a bill for an injunction to restrain defendant from interfering with his drainage by building any dyke within one-half mile east of his land, or along the east side of section 19 so as to inclose Davis creek. An order was made by the judge to whom he applied, on March 4, 1913, requiring defendant to furnish plaintiff a bond to protect him against any damage to his land by water resulting from its dykes being too near the same. The work proceeded, however, without any bond being given until defendant reached with its cut and dyke the south side of section 19 and proceeded towards the west and in July, 1913, plaintiff appealed to the court for preliminary relief under his bill and the

judge to whom he applied, together with the parties in interest and counsel, went upon the ground where they looked over and discussed the situation. The evidence is in conflict as to whether or not any agreement was reached between the parties whereby plaintiff consented to what was subsequently done, but it appears that defendant gave assurances to the judge as to where its dyke east of plaintiff's land would be located. He then orally directed that it file the bond previously ordered and permitted defendant to proceed in the direction the dredge was then working, and the bond was thereafter filed. Some three weeks later defendant turned north on section 19 so far to the west that it crossed the windings of the creek with its cut and dyke. Plaintiff claimed this was in violation of its promise to him and the judge who permitted it to proceed, which defendant denied claiming that the cut, which was west of the dyke, served to straighten out the creek, or supply the drainage previously furnished by it. To what extent it served that purpose is in marked dispute. While this work was going on an application was made by the township of Kochville for an injunction to restrain defendant from putting any dyke in or west of the creek, which was granted. The cut and dyke were continued north through section 19 and defendant thereafter completed a dyke east from the north quarter post of that section closing its dykes.

Plaintiff's claim is that the natural drainage through Davis creek was destroyed, and the cut on the west outside of the north and south dyke constantly remained full of water because of insufficient fall and outlet; that this dyke extending north and south in the line of drainage so near his land on the east, between it and the river, is in itself a complete barrier to the natural escape of water from his premises to where it had previously gone, and with the other dykes

excludes it from a large area of much lower inclosed marsh land where it previously flowed and spread, thus impeding and changing the former free drainage conditions so that his land remains constantly soaked and too wet for successful tillage.

Defendant's contention is that the cut outside of the dyke furnishes better drainage below plaintiff's land than Davis creek did in combination with all the low area north and east of the Saginaw river; and that plaintiff consented to its placing this dyke where now located north and south through section 19, which he emphatically denies. These issues upon which there is much conflicting testimony were within the realm of facts for the jury.

The law is well settled in this State and elsewhere that the natural flowage of surface water from an upper estate is a servitude which the owner of the lower estate must bear, and he cannot hold it back by dykes or dam its natural channels of drainage to the injury of the owner of the upper estate. *Boyd* v. *Conklin*, 54 Mich. 583 (52 Am. Rep. 831); *Leidlein* v. *Meyer*, 95 Mich. 586.

Defendant does not question this rule of law nor on the facts seriously controvert plaintiff's evidence as to the history, previous condition and productivity of his farm, but contends as to his failures of crops in the years for which he seeks damages that they were not as serious as he claims, but were to the extent actually shown the result of weather conditions during those years, in which the seasons were unfavorable for farming owing to excessively wet springs and later drouths, common to all and causing poor crops generally in that region. To sustain that contention certain testimony of farmers was introduced by defendant as to conditions elsewhere and failure of their own crops, without showing that the conditions, crops, tillage, soil, elevation with natural drainage facilities,

etc., were like or similar to those of plaintiff's farm, admission of which is assigned as error. While it was competent to show the weather conditions during those years and how crops were generally affected by them in that section—whether they were favorable or unfavorable years for crops and why, it was incompetent to show against objection the special experience of the individual farmer with his own land and crops without laying the proper foundation of similarity. Without detailing the particular instances it may be said in passing that this was permitted during the trial to an objectionable if not prejudicial extent.

A serious issue in the case strenuously contested was whether plaintiff waived his objections to the north and south dyke east of his land being constructed where it is located on section 19. Defendant claimed he did so when the parties were on the ground with the judge to whom plaintiff had applied for an injunction and who had previously ordered an indemnity bond which he again orally directed defendant to give. He was there but once. Plaintiff contended that in the affair there was no agreement, but on the contrary he was earnestly requesting of the court protection and relief which he failed to obtain except to the extent of the bond which was given three weeks later and, it being for a limited time, an auxiliary agreement by defendant to give a further bond for the same amount as permanent indemnity, or protection against damages to his drainage. In support of his claim that there was no consent by him to the line as located, plaintiff produced these papers from the files of the chancery suit between the parties, identified and offered them in evidence. On objection by defendant's counsel they were not then admitted but after discussion held by the court for consideration, and near the close of the case were re-

ceived in evidence. In the midst of the charge, after explaining and submitting to the jury the question of whether plaintiff agreed to the location of the dyke where placed and instructing them that in such case "plaintiff cannot recover any damages which he has been caused by defendant doing what plaintiff greed then to do," the court said to plaintiff:

"I think now, * * * I will have to take those papers from consideration of the jury for this reason: That they were not read in evidence, * * * I think I will take them from consideration, the bond and agreement."

And went on with the charge, first saying to the jury:

"But you have a right to take into consideration all the facts in the case that I have not withdrawn from you in determining whether such an agreement was made or not."

To this transaction in the midst of the charge plaintiff seasonably excepted, later presenting it as one of his grounds for a motion for a new trial, which was refused, and he now urges it as prejudicial error. That it was prejudicial to plaintiff's contention as to the significance of these papers upon a controlling issue of fact in the case, if decided against him, is evident. They were legal documents from the files of a case between the same parties and in the hands of the court, were held for some time to consider their admissibility, and after discussion admitted, as the court stated in the presence of the jury, for their bearing upon the probability of plaintiff having consented to the dyke of which he complained being put where it was located, "but for no other purpose," the court then saying directly to the jury, "Now, gentlemen of the jury, when I say for no other purpose, do not use them for any other purpose." When they were withdrawn by the court during the charge while

discussing the only matter to which they related, with instructions to the jury not to take them into consideration, no objection had been made by defendant to the jury considering them, after they had been admitted, the general nature of, and plaintiff's purpose in offering these legal documents had been stated and discussed in the presence of the jury. Their only purpose was to indemnify plaintiff and the fact that they were given was but circumstantial evidence bearing upon the probability of another claimed fact directly involved in the case. It would seem that the jury were sufficiently advised by what had transpired in their presence and was said to them of the nature and purpose of these documents to understandingly pass upon the significance of their having been given, and if at that stage of the case the court thought for any reason they should be further advised or instructed the documents were in evidence in the hands of the court and available for that purpose. If it was technically discretionary with the court on its own motion to at that time strike them out, in the midst of the charge, for the reason stated, we are impressed that under the circumstances shown and verdict rendered such course tended prejudicially against plaintiff's contention on an issue of fact in which an adverse verdict was fatal to his case, and the court's refusal to grant plaintiff's subsequent motion for a new trial, which he states in his brief was not opposed, amounts to an abuse of discretion. Plaintiff twice presented his motion for a new trial, the second time supported by affidavits, with Government data and maps, made a part of the same, tending amongst other things to show that the level of Lake Huron including Saginaw bay was not above normal during the years in question as had been claimed with supporting testimony by defendant to account for any excessive water around its dykes. This the court rejected as cumula-

tive when denying the motion. Defendant's plea was the general issue, with special notice of the defense that plaintiff had consented to the dykes as placed. While perhaps within the scope of the general issue, the distinct defense of high water on Lake Huron during those years was not suggested by the pleadings and it can well be urged that plaintiff's failure to anticipate and prepare for it was not an inexcusable lack of diligence. What he presented was apparently new and newly-ascertained evidence, material to a vital issue in the case. We are impressed that considered as a whole plaintiff's motions present meritorious features in law and fact entitling him to a retrial.

In relation to plaintiff's application for a temporary injunction in the chancery suit between the parties which was shown in connection with the judge and parties viewing the premises, defendant emphasized the fact that a well-known judge to whom plaintiff applied did not grant the same, but permitted defendant to proceed with the work. Referring to this application plaintiff requested the court in writing to instruct the jury that "The granting, or not granting, a temporary injunction is no ground for action, or defense, in this action." The manner in which the occasion of his unsuccessful application for an injunction was testified to and discussed during the trial made this request pertinent and of added importance to plaintiff. He was entitled to have the jury instructed as requested. Failure to do so was error.

As the case will be sent down for retrial it is inadvisable and unnecessary to review the exhaustive discussion and argument of evidence to which counsels' briefs are largely devoted and which relate largely to the facts in issue, or to pass upon the many other assignments of error, some of which do not call for serious consideration, while any that might otherwise

demand discussion are not likely to arise upon retrial of the case.

For the reasons stated the judgment is reversed with costs to plaintiff and a new trial granted.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

LOZON *v.* McKAY.

1. SPECIFIC PERFORMANCE — VENDOR AND PURCHASER — LAND CONTRACT—FORFEITURE.

   The vendee in a land contract which has been forfeited, unless relieved therefrom, has no right to specific performance.

2. EQUITY—LAND CONTRACT—FORFEITURE—RELIEF.

   Equity will sometimes relieve against forfeiture, and, ordinarily when incurred by mere nonperformance of a pecuniary obligation at the day, when time is not of the essence of the contract, when performance by the defaulting party can be secured, and his general conduct has not been such as to render it unjust.

3. VENDOR AND PURCHASER — FORFEITURE — OUSTER AND ENTRY — LANDLORD AND TENANT.

   As to whether ouster and entry can be effected by the vendor in a land contract making arrangements with the vendee's tenant to hold for him after forfeiture—*quære*.

4. SPECIFIC PERFORMANCE — FORFEITURE — TENDER — RELIEF FROM FORFEITURE.

   On vendee's bill for specific performance after forfeiture, the money due ought to have been tendered before suit was begun, or, in any event, brought into court so that the court might be certain that the terms upon which relief from forfeiture was granted would be complied with.

5. SAME—AMENDMENTS—CONDITIONAL DECREE.

Treating the bill for specific performance after forfeiture as amended to ask for relief from forfeiture, the decree of the court below dismissing the bill will be modified, on appeal, upon condition that within 60 days the vendee pay the unpaid purchase price, with interest, taxes, and costs of both courts, the vendor being required to execute conveyance in accordance with the contract; otherwise decree of court below to stand.

Appeal from Ogemaw; Sharpe, J. Submitted April 16, 1918. (Docket No. 94.) Decided October 7, 1918.

Bill by Archie Lozon and another against James McKay for the specific performance of a land contract. Defendant filed a cross-bill to set aside the contract for default. From a decree for defendant, plaintiffs appeal. Modified, and conditional decree entered for plaintiffs.

James B. Ross and *C. W. Hitchcock*, for plaintiffs.

William T. Yeo, for defendant.

OSTRANDER, C. J. The contract, the subject-matter of this suit, had been forfeited, pursuant to its terms, after the admitted default of the vendees. The vendees, plaintiffs, ask the court to specifically enforce the contract. It is not true that defendant is asking equity to assist him in forfeiting the rights of plaintiffs. Forfeiture was accomplished before the bill was filed. Unless plaintiffs are relieved, defendant's right to the decree which was rendered is clear. *Pendill* v. *Mining Co.*, 64 Mich. 172.

Plaintiffs do not, in terms, ask the court to relieve them of the forfeiture, which of course must be done before any right based upon the contract can be enforced, and this fact and the attitude of plaintiffs must, I think, have affected the trial judge in concluding that plaintiffs cannot be relieved. In a short

opinion, returned with the case but not printed, the learned trial judge said:

"The question presented in this case is whether after defendant has served notice of forfeiture of plaintiffs' rights as a purchaser under a land contract for neglect to make payments as therein provided, this court has the power on a bill filed by plaintiffs for specific performance, to relieve plaintiffs from such forfeiture. * * * As I intimated at the hearing, if I could grant equitable relief to the plaintiffs, I would gladly do so but courts can but construe and then force (enforce?) the provisions of contracts as made. All the rights of plaintiffs have become forfeited at law."

Equity will sometimes relieve against forfeiture. It will do so, ordinarily, when it is incurred by the mere nonperformance of a pecuniary obligation at the day, when time is not of the essence of the contract, either made so by the nature of the subject-matter or by the express terms of the agreement, when performance by the defaulting party can be secured and when his general conduct has not been such as to render it unjust that he should be relieved.

The agreement here in question does not, in terms, make time essential, beyond the ordinary fixing of due days and requiring the plaintiffs to pay the taxes. The reasons for forfeiting stated in the notice are failure to pay taxes and to pay the installments called for by the terms of the contract. Only one installment of interest was paid, and that in November, 1914. The contract was made in April, 1914, and called for semi-annual payments of interest. Notice of forfeiture was given in July, 1916, at which time $200 of principal had been due for more than three months. Plaintiffs paid the taxes for 1914 and 1915, but have paid none since then. They have never tendered or offered to pay the sums called for by the contract. One plaintiff testified that arrangements have now

been made to borrow the money on the land to pay the contract debt.

While it is claimed that defendant, after forfeiture, made arrangement with plaintiffs' tenant to hold for him, and is therefore in possession of the land, so that forfeiture and entry thereafter were complete when the bill was filed, it is at least doubtful if ouster and entry can be in such manner effected.

It is apparently as uncertain now as it has been for years whether the plaintiffs can pay what is due to defendant. It ought to have been tendered before suit was begun, in which case it is likely that no suit would have been necessary. The money should, in any event, have been brought into court, so that the court might be certain that the terms upon which relief from forfeiture was granted would be complied with.

It is clear that a decree for specific performance can not be made. Treating the bill as amended so as to ask for relief from the forfeiture, and extending to their limits the rules governing the granting of relief in such cases, the decree below may be modified so as to relieve plaintiffs from the forfeiture upon condition that within 60 days after the entry of decree in this court they pay to defendant, or to the register of the circuit court for the county of Ogemaw, the unpaid purchase price of the land, with all arrearages of interest and any sum paid by defendant for taxes upon the land, with costs of both courts, upon which payment defendant shall execute and deliver a conveyance in accordance with the contract; in default of which payment defendant shall have the relief granted him in the court below, with costs of both courts.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with OSTRANDER, C. J. BIRD, J., concurred in the result.

ALLSWEDE *v.* CENTRAL WAREHOUSE CO.

1. WAREHOUSEMEN—EVIDENCE — CONVERSION — REPLEVIN PROCEEDINGS—DESCRIPTION OF PROPERTY.

   In a suit against a warehouseman for conversion of beans stored with him, where the defense was that they had been taken by replevin, the replevin proceedings were inadmissible where the writ called for 250 bags of beans described as lot 330, whereas plaintiff's warehouse receipt called for 250 bags of beans described as lot 233.

2. SAME—REPLEVIN PROCEEDINGS—AMENDMENTS.

   Permission to amend the description in the writ and return to correspond with the warehouse receipt was properly refused, since plaintiff was not a party to the replevin case, and an amendment in the description of the property would release the sureties on the replevin bond.

3. SAME—REPLEVIN—NOTICE TO OWNER—RELEASE FROM LIABILITY —STATUTES.

   Notice by telephone by warehouseman to the owner of beans that they had been taken from his possession by replevin was not a compliance with the statute (2 Comp. Laws 1915, § 6559) providing for release from liability by notice in writing served personally or by registered letter.

4. SAME—COMPROMISE AND SETTLEMENT—ESTOPPEL.

   Plaintiff was not estopped from suing warehouseman for conversion of beans by compromise negotiations for payment which failed, since one is not concluded unless the terms of the negotiation are carried out in whole or in part.

Error to Saginaw; Gage, J. Submitted June 7, 1918. (Docket No. 76.) Decided October 7, 1918. Rehearing denied January 31, 1919.

Case by William H. Allswede against the Central Warehouse Company for the conversion of certain beans. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

E. L. Beach, for appellant.

Devereaux & Vincent (*Purcell & Travers*, of counsel), for appellee.

BIRD, J. Plaintiff stored 250 bags of beans in defendant's warehouse, in the city of Saginaw, on February 24, 1915, and took a receipt therefor, describing them as Lot Number 233. Later when he demanded them he was advised by defendant that they had been replevied by the Henry W. Carr Company. Plaintiff thereupon referred the matter to his attorney for investigation. It developed that the Henry W. Carr Company claimed that plaintiff had sold the beans to it and that the suit in replevin was for the purpose of enforcing delivery under the sale. There was some talk between counsel for the parties about an adjustment of the matter, but it was never carried out and this suit was begun to recover the value of the beans. After the testimony was closed both parties requested a directed verdict. The trial court was of the opinion that the defendant had not made out its defense and that it was guilty of conversion of the beans. Plaintiff was awarded a verdict of $3,136.83.

1. Defendant's principal defense was that the beans had been taken from its possession by a writ of replevin issued in favor of the Henry W. Carr Company. Plaintiff objected to the admission of the replevin proceedings because the writ called for 250 bags of beans described as Lot 330, whereas the plaintiff's warehouse receipt called for 250 bags of beans described as Lot 233. The trial court held the objection good and excluded the proceedings. Defendant's counsel, who was plaintiff's counsel in the replevin case, then asked permission to amend the description in the writ and return, to correspond with the description in the warehouse receipt. The defendant in this case, who was also the defendant in the replevin case, signified its consent to this amendment. The

trial court held this ought not to be done because the plaintiff in this suit was not a party to the replevin case, and because an amendment in the description of the property named in the writ and return would release the sureties on the replevin bond. Plaintiff's counsel insist that whether the court was right or wrong in his refusal to permit an amendment in the replevin case, an assignment of error in this case cannot raise the question. The conclusion of the trial court with reference to the release of the sureties is supported by the holding of this court in *Bolton* v. *Nitz*, 88 Mich. 354, where the point was directly involved and decided. The denial of the motion to amend was not error.

2. Defendant's counsel also contends that it is absolved from any liability by reason of the following statute:

"Whenever any goods, wares, merchandise, or other personal property shall be taken from the possession of any warehouseman, by writ of attachment or replevin, or other legal process, said warehouseman shall at once give written or printed notice thereof to the owner or person named in the warehouse receipt given for said property, or in case said warehouseman shall have received notice of any transfer of said property, and of the name and address of the transferee, he shall also give to said transferee like notice of said suit. *Said notice may be delivered personally or sent by registered mail, postpaid. If such notice shall be given, as aforesaid, said warehouseman shall not in any way be liable on account of said suit to said owner or transferee of said property,* or to the holder of any receipt or voucher given for the same, saving and reserving to such owner or holder the legal remedies for the recovery of the said goods, wares, merchandise and other personal property from any person unlawfully detaining the same, or for damages against any person unlawfully taking the same." 2 Comp. Laws 1915, § 6559.

Plaintiff's counsel reply that the statute does not

apply because the notice required by the statute must be in writing, and served personally or by registered mail. The proofs show that all the notice which the plaintiff received of the replevin proceedings was over the telephone. We do not think this method of notifying plaintiff was such a compliance with the statutory requirement as to entitle defendant to the protection of the statute.

3. The further point is made by counsel for defendant that whatever defect there may have been in the description of the property in the replevin proceedings and in giving notice under the statute were waived by plaintiff. It appears that after plaintiff was notified over the telephone that his property had been taken by a writ of replevin he turned the matter over to his counsel, who went to Saginaw to make an investigation. He talked the matter over with counsel for the Henry W. Carr Company and was assured that plaintiff would get his pay if he would draw a draft on the Henry W. Carr Company for the price of the beans. In pursuance of this assurance a draft was drawn but was unhonored and a second draft was drawn and this was refused. We are unable to see how these negotiations would estop the plaintiff from maintaining the present action unless the promise to pay for the beans was carried out by the Henry W. Carr Company, or some effort made to carry it out. One is not concluded by negotiations for compromise unless the terms of the negotiation are carried out in whole or in part. 8 Cyc. p. 534.

Other assignments are argued but we think they are rendered unimportant by the conclusions we have reached on the questions already considered.

The judgment is affirmed.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with BIRD, J. OSTRANDER, C. J., concurred in the result.

NICHOLS *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. RAILROADS—CROSSING ACCIDENT — PERSONAL INJURIES — NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injuries caused by a collision between plaintiff's automobile and defendant's train at a crossing in a village, evidence that the train was running 30 miles an hour and that the statutory signals were not given, *held*, to present a question of fact for the jury as to defendant's negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff's automobile stopped within 10 feet of the side track waiting for an east-bound train to pass, and, after looking and listening, proceeded to cross, although view of west-bound track was obstructed, and was struck and injured by west-bound train, it cannot be said that plaintiff was guilty of contributory negligence, as matter of law, for failure to again stop on side track or space between tracks to make observations before proceeding.

OSTRANDER, C. J., and BROOKE, J., dissenting.

Error to Cass; Des Voignes, J. Submitted June 18, 1918. (Docket No. 47.) Decided October 7, 1918.

Case by Ida M. Nichols against the Grand Trunk Western Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Harrison Geer (*R. R. Weaver*, of counsel), for appellant.

M. L. Howell, *V. G. Jones*, and *Walter C. Jones*, for appellee.

BIRD, J. Plaintiff and her husband are farmers, and reside some distance south of the village of Marcellus. On November 14, 1916, she, her husband and son drove to the village in their Ford automobile.

See notes in 21 L. R. A. (N. S.) 794; 29 L. R. A. (N. S.) 924; 46 L. R. A. (N. S.) 702.

After attending to their errands they started for home at about 3:30 in the afternoon. The son was at the wheel and plaintiff sat in the rear seat with her husband. They proceeded south on Center street until they reached the two-track railway of defendant where they stopped to allow an east-bound freight train to pass. After the train cleared the crossing they looked and listened to discover whether a train was approaching on the west-bound track. They discovered nothing and proceeded on their way, only to be struck a few moments later by a rapidly moving west-bound special, composed of a locomotive and caboose. The result of the collision was the death of the son, serious injury to the plaintiff and destruction of the machine. Plaintiff brought suit to recover compensation for her injuries and was awarded a verdict of $3,000, on the theory that defendant was guilty of negligence in the operation of its train.

The principal questions raised by defendant are:

(1) Was defendant negligent in the operation of its train?

(2) Was plaintiff guilty of contributory negligence?

1. Counsel contends that no actionable negligence upon the part of the defendant was shown and that the trial court was in error in refusing to direct a verdict in its behalf on that question. Plaintiff's testimony shows that defendant's double track railway extends through the village of Marcellus in a northeasterly and southwesterly direction and crosses Center street at an angle of fifty-three and one-half degrees; that as they approached the crossing an east-bound freight train was either passing or stood on the south main track near the crossing; that one or two cars stood upon the side track north of the west-bound track, which, together with the buildings of the Marcellus milling plant, entirely obstructed their view of the west-bound track east of the crossing until

they had crossed the side track. It was further shown that the defendant operated its train over the crossing at a speed of 30 miles an hour without giving any warning of its approach and without any warning from the crossing signals. If plaintiff's testimony is to be accepted that defendant operated its train over the crossing in question at a rate of 30 miles an hour without giving the statutory warning, it opened the way for the jury to find that defendant operated its train in a negligent manner.

Counsel argues, however, at some length, that plaintiff's testimony did not make a case for the jury because it did not show that the statutory signals were not given; that the testimony relied upon to establish this fact was negative testimony. We cannot accept this version of the evidence. There were at least two witnesses who gave positive testimony that the signals were not given. Other testimony to the same effect was more or less uncertain, but was of some value in determining the question. The question of defendant's negligence was clearly within the domain of fact and, therefore, one for the jury. *Crane* v. *Railroad Co.*, 107 Mich. 511; *Hinkley* v. *Railway Co.*, 162 Mich. 546; *Tietz* v. *Railway Co.*, 166 Mich. 205.

2. Was plaintiff guilty of contributory negligence as a matter of law? Plaintiff's automobile was driven down Center street and stopped within 10 feet of the side track. After waiting for the east-bound train to pass they looked and listened, and hearing nothing they proceeded on their way. Counsel argues that plaintiff did not stop her automobile at a place where the view was unobstructed as she should have done. Where plaintiff stopped, her view of the track to the east of the crossing was so completely obscured by the buildings of the milling plant and by the cars on the side track that she could get no view of the west-bound track until she passed the cars on the side

track, as they stood very close to the highway. Had she stopped further north the view would have been no better. The distance between the side track and the west-bound track was less than 20 feet, and counsel argues that plaintiff should have driven into that space and stopped. We do not think we can say as a matter of law that plaintiff was guilty of contributory negligence for not driving on to the side track or into the space between the west-bound track and side track to make observations before proceeding to cross the tracks. Ordinarily when one gets within 10 feet of a railroad track and stops, his sense of hearing, if normal and diligently used, will determine whether it is safe to proceed. This crossing at the time, however, was beset with many difficulties. It is possible that plaintiff ought to have done just what counsel suggests, but if it were her duty to do so it was a question of fact to be determined by the jury, and not by the court. Whether she should have driven on to the side track and taken the chances of the cars being shunted against her, or have driven into the open space between the two tracks with its attendant dangers to make observations is a question about which reasonable minds might well differ. Another fact which the jury had a right to take into consideration in determining the question was the fact that neither of the crossing bells was ringing at the time.

Counsel urge that this case is ruled by *Sanford* v. *Railway Co.*, 190 Mich. 390. In the case cited there were no such obstructions to shut off the view of the traveller as in the present case and neither was it necessary in that case for plaintiff to drive onto a side track or into a narrow space between two tracks in order to obtain a view of the main track. Had Sanford exercised the care that the plaintiff did in stopping his car he probably would not have been in collision with the train.

We think the trial court was right in submitting both of these questions to the jury. The verdict is affirmed.

MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred with BIRD, J.

BROOKE, J. (*dissenting*). I am of opinion that the facts in this case bring it clearly within the principle announced in *Sanford* v. *Railway Co.*, 190 Mich. 390. The judgment should be reversed.

OSTRANDER, C. J., concurred with BROOKE, J.

TOWNSHIP OF HART *v.* NORET.

1. INDEMNITY—JUDGMENT—RES JUDICATA.
   The judgment against a township, in an action for personal injuries caused by a defective railing on a bridge, was conclusive as to the existence of the defects, the injury to plaintiff therein, that he was free from contributory negligence, and the amount of damages awarded.

2. SAME—ADMISSIONS—DIRECTED VERDICT.
   In an action by the township for indemnity, on the theory that defendant was responsible for the defective railing, defendant's admission that he took the railing away and erected the one in question, in addition to issues conclusively settled in the case against the township, made the case against defendant complete, requiring directed verdict for plaintiff.

Error to Oceana; Sullivan, J. Submitted June 12, 1918. (Docket No. 25.) Decided October 7, 1918.

See notes in 40 L. R. A. (N. S.) 1165; L. R. A. 1916 F, 86.

Case by the township of Hart against Edwin A. Noret for indemnity against a judgment for personal injuries. Judgment for defendant. Plaintiff brings error. Reversed, and judgment entered for plaintiff.

Hall & Greene and *Hall, Gillard & Temple*, for appellant.

F. E. Wetmore, for appellee.

BIRD, J. Defendant Noret, in April, 1912, moved several buildings in the village of Hart, over a mill-race bridge, situate in the public highway. In doing so, it became necessary, on account of the width of the buildings, to remove the railings on the bridge. After getting the buildings across, his workmen, in obedience to his orders, either replaced the old railings or erected new ones. On July 12, 1912, William McRae, while crossing the bridge on a bicycle, ran into an accumulation of sand which stopped or slowed down his machine. In attempting to steady himself he took hold of the railings, they gave away with him and he was precipitated into the stream 20 feet below, causing him serious injury. He sued the township and the Gurneys, the owners of the mill, on the theory that they were negligent in permitting defective and insecure railings on the bridge, and recovered against both defendants a substantial verdict. After the suit was commenced and before trial the township notified defendant in writing that the suit had been commenced and requested him to defend the same, and notified him that it would hold him liable for any judgment that might be rendered against it. Noret paid no attention to this notice and made no defense. The judgment recovered against the Gurneys and the township was afterwards reviewed in this court and affirmed (*McRae* v. *Township of Hart*, 179 Mich. 325). The township then paid the judgment and sued de-

fendant to enforce indemnity on the theory that the defendant was responsible for the condition of the barriers. The defendant interposed a demurrer to the declaration, which was sustained in the trial court, but was afterwards reversed in this court (191 Mich. 427, L. R. A. 1916F, 83). Much controversy was indulged in throughout the trial concerning what questions were conclusively settled against the defendant by McRae's case against the township. At the close of the testimony the township requested a directed verdict, but the trial court was of the opinion that defendant's liability was a question of fact. He, therefore, submitted it to the jury and they returned a verdict for the defendant.

1. In order to determine whether the trial court should have granted plaintiff's request, it will be necessary to examine the state of the proofs at the close of the testimony. Applying the general rule, the judgment against the township was conclusive in this case on the following propositions:

(*a*) As to the existence of the defects which caused the damage.
(*b*) The injury to McRae.
(*c*) That McRae was free from contributory negligence.
(*d*) The amount of damages awarded McRae.

The only question, therefore, open upon this inquiry was the question of the liability of defendant. 22 Cyc. p. 106; *City of Lansing* v. *Railroad Co.*, 129 Mich. 403; *Grant* v. *Maslen*, 151 Mich. 466 (16 L. R. A. [N. S.] 910); *Grand Rapids Lumber Co.* v. *Blair*, 190 Mich. 518.

The defendant himself testified he took away the railings and that his workmen erected the ones in question. The recovery against the township was had upon the theory that these barriers were defective and insecure. This testimony, therefore, in addition to

the issues which were conclusively settled in the case against the township made the case complete against the defendant, inasmuch as no claim was made by him that any change took place in the railings before McRae's injury. Defendant's admission that he was responsible for the barriers, which were adjudged in the other case to be the cause of McRae's injury, left no question of fact to be determined by the jury. The court should have granted plaintiff's request.

The judgment for defendant is reversed. A judgment will be entered in the trial court in favor of plaintiff for the amount of the judgment and costs in the case of McRae against the township of Hart *et al.*

Plaintiff will recover its costs in this case in both courts.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with BIRD, J. OSTRANDER, C. J., concurred in the result.

SPONENBURGH *v.* GILLESPIE.

MUNICIPAL CORPORATIONS — POLICE DEPARTMENT — CIVILIAN EMPLOYEES—DISCHARGE—RIGHT TO HEARING.

Under Act No. 416, Local Acts 1901, providing for the police government of the city of Detroit, the superintendent of the signal service and his assistant were not members of the police force, entitling them to a hearing on charges preferred before the police commissioner before discharge from the service; they being merely civilian employees of the police department.

Appeal from Wayne; Hally, J. Submitted June 14, 1918. (Docket No. 24.) Decided October 7, 1918.

Bill by Charles L. Sponenburgh and another against John Gillespie, commissioner of police of the city of Detroit, to enjoin the dismissal of plaintiffs from the police department. From a decree for plaintiffs, defendant appeals. Reversed, and bill dismissed.

A. B. Hall and *Frank W. Atkinson*, for plaintiffs.

Allan H. Frazer, for defendant.

BIRD, J. Defendant, as police commissioner, gave plaintiffs notice that they would be discharged on July 1, 1916, from their respective positions with the police department of the city of Detroit. On June 28th they filed this bill praying for a writ of injunction to prevent such removal. Plaintiffs have been connected with the department for several years, and at the time of their discharge plaintiff Sponenburgh was acting as superintendent of the signal service of the department, and plaintiff Cocup was acting as his assistant. Their claim is that they cannot be dismissed by the commissioner without charges being preferred and an opportunity given to be heard in their defense. They base this contention on section 9 of the act, the material part of which reads:

"The qualifications, enumerations and distribution of duties and mode of trial and removal from office of each officer and member of said police force shall be particularly prescribed by rules and regulations of said commissioner of police, and no person shall be appointed to or hold office in the police force who is not a citizen of the city of Detroit, shall not have resided in the State of Michigan two years next preceding his appointment, who cannot read and write the English language, or who has ever been convicted of any crime: *Provided*, That no person except the superintendent, deputy superintendent, detectives, the attorney, the surgeon, secretary and property clerk, shall be removed from said force, except upon written charges preferred against him to the commissioner of

police, and after opportunity of being heard in his defense." * * * Act No. 416, Local Acts 1901.

Defendant takes the position that plaintiffs are not members of the police force within the meaning of the act, but are civilian employees of the department and, therefore, may be summarily dismissed.

Section 1 of the act provides:

"That the powers and duties connected with and incident to the police government and discipline of the city of Detroit shall be vested in and exercised by one commissioner of police, a superintendent and other officers, and patrolmen, as hereinafter provided."

Section 5 confers on the commissioner authority to appoint officers and patrolmen, and section 9 prescribes certain qualifications as a prerequisite to appointment to the police force.

A study of the act gives the impression that it was framed with the idea of making membership in the force attractive to qualified men. To promote the efficiency of the force the act provides that official positions shall be filled by promotions from the ranks. Also provides accident insurance for them. Freedom from dismissal is guaranteed to them unless charges are preferred and opportunity for a hearing given. These and other provisions make for the good of the service, but they appear to be reserved for the benefit of the members of the force.

We think it would hardly be contended that the employees engaged in setting the telegraph poles and stretching the wires thereon were members of the force and entitled to these privileges, and yet why not, if the man who directs their work is a member of the force? Neither the superior nor inferior connected with the telegraph line is filling any position created by the statute, nor is either doing any police duty. The only reference made by the act to the business in

which they are engaged is found in section 7 where, defining the powers of the commissioner, it says:

"He shall have the custody and control, of all public property, books, records and equipment belonging to the police department, and shall have power to erect and maintain such lines of telegraph in such places within said city as for the purposes of police shall deem necessary." * * *

It must have been understood by the legislature that an organization of this character in a city the size of Detroit would necessarily be obliged to employ agents and servants to assist in its operation. Indeed, section 9 gives evidence of this when it says that:

"All other salaries and compensation to the officers, appointees and *employees* of the department shall be prescribed and determined by the commissioner of police and shall be paid semi-monthly to the persons entitled thereto."

Had the legislature intended that the employees of the department should be members of the police force and entitled to the privileges thereof, we assume it would have so indicated by some appropriate language.

We are of the opinion that section 1, construed with other sections of the act, restricts the membership of the force to the officials and patrolmen whose positions have been created by the terms of the act. It is true, plaintiffs were officials in the business in which they were engaged, but the official positions which they held were neither created nor recognized by the statute. Our conclusion is that plaintiffs are not members of the police force but are civilian employees of the police department. In support of this interpretation, see *People, ex rel. Sweeney*, v. *York*, 43 App. Div. 444 (60 N. Y. Supp. 208).

The chancellor who heard this case below was of a different opinion. He was inclined to the opinion that plaintiffs were members of the police force. In the closing paragraph of his opinion he says:

"Was the commissioner justified in removing these men without a hearing? In two places in the act the exceptions are made to the general rule. In one case a negative precedes the exception, and the use of a negative in the statute makes the statute imperative." Citing *Connecticut Mutual Life Ins. Co.* v. *Wood,* 115 Mich. 444.

The chancellor's conclusion is quite right, if it be conceded that plaintiffs are within the class to which the exception refers, but we are unable to agree with him that plaintiffs are within that class.

With the main question decided we think it will be unnecessary to consider the other questions discussed. The decree must be reversed and one entered in defendant's behalf denying relief to plaintiffs and dismissing their bill. No costs will be allowed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

FOWLER v. STUBBINGS.

1. EQUITY—PLEADING — QUIETING TITLE — JURISDICTION — APPEAL AND ERROR.

   A bill to quiet title to land, reciting that plaintiff acquired title by tax deeds, that he served proper notice to redeem, that no redemption was made, and that he had peaceable entry, and defendant's answer denying notice as to him, presented an issue which might be settled by the appellate court; equity having jurisdiction to quiet titles to land, and the bill not having been demurred to.

2. TAXATION—REDEMPTION—NOTICE — REGISTERED LETTER — SHERIFF'S RETURN.

   Under section 140 of the tax law (Act No. 142, Pub. Acts 1905),

in force at the time service of notice to redeem was made by the sheriff by registered letter, providing for filing by the sheriff of receipts received for such letters with his return, where the receipt received by the sheriff and filed was signed, not by defendant, to whom the letter was sent, and who denied receipt of notice, but by a stranger, *held*, that the service was insufficient.

Appeal from Muskegon; O'Brien, J., presiding. Submitted April 16, 1918. (Docket No. 104.) Decided October 7, 1918.

Bill by John C. Fowler against Wilson H. Stubbings and others to quiet title to land sold for delinquent taxes. Defendant Stubbings filed a cross-bill to redeem from said sale. From a decree for defendant, plaintiff appeals. Affirmed.

Charles B. Cross and *Wallace Foote*, for plaintiff.

Alex. Sutherland, for defendant Stubbings.

OSTRANDER, C. J. One who has acquired deeds from the auditor general for State tax lands, who claims to have given the proper notice to those appearing to be entitled thereto, who has waited the requisite time and no redemption has been made, and who has peaceably entered into possession of the land, is not often, if ever, entitled to maintain a bill in equity to quiet his title as against any right or interest existing when his deeds became effective. This is the position the plaintiff in this suit claims that he occupies. It is true that in *Flint Land Co.* v. *Godkin*, 136 Mich. 668, and in *Flint Land Co.* v. *Fochtman*, 140 Mich. 341, it was held that under the circumstances appearing the demands of defendants that the bills be dismissed ought to be refused. But in *Triangle Land Co.* v. *Nessen*, 155 Mich. 463, a decree overruling a demurrer to a bill such as is filed in the instant case was reversed. The reasons there given for the conclusion reached

would require the court to sustain a demurrer here, if one had been filed. The record title of the defendants is not a cloud upon the title which plaintiff derived through the tax proceedings. No other cloud, or claim, or interest, is set up in the bill, and no question of title was in fact in issue at the hearing. What was decided was that as to one defendant, who answered, plaintiff had not given him the notice which the tax law requires to be given and that, in consequence, he is now entitled to redeem the land. It is manifest that if this defendant had, or has, the right to redeem, the tax law shows him the road. He does not need the interference, or the aid, of a court of equity. I am therefore impressed that this court ought to dismiss the case out of court, leaving the parties to proceed as they may be advised in a court of law. I am impressed that neither the bill nor the bill and answer present a matter within the proper jurisdiction of a court of equity. My associates are of opinion that, a court of equity having jurisdiction to quiet titles to land, the bill not having been demurred to, it and the answer present an issue which may be settled here.

Considering the question decided by the trial court, it is to be observed that while defendant Stubbings appears to be the grantee in a quitclaim deed, dated June 3, 1914, recorded June 15, 1914, there is no testimony, no evidence, in the record tending to prove that, when plaintiff gave the notices, defendant Stubbings had any interest in the land. Nor, upon this record, does the quitclaim deed referred to purport to have been executed by any one owning or having any interest in the land. And yet the court found, among other things, that "defendant, Wilson H. Stubbings, is the record owner in fee simple" of the land. Counsel for plaintiff, appellant, do not, however, pay attention to any subjects excepting two, which are (1)

that the tax notice was properly served upon defendant Stubbings, (2) that it was not necessary for the sheriff who served the notices to return that no one was in possession of the premises. These are the questions considered in the opinion of the learned trial judge, and seem to have been the only ones he was called upon to consider.

Defendant Stubbings lived in Glenellyn, Illinois, with his son, Wilson H. Stubbings, Junior, a man 25 years old, and a daughter. The registered letter containing the notice was correctly addressed to defendant by the sheriff of Muskegon county, and was received for registration by the postmaster at Muskegon, January 29, 1909, postage paid. It is plaintiff's contention that, having delivered the letter to the postmaster and taken his receipt therefor, service upon defendant Stubbings was completed; that under the statute no other evidence of service is required. In fact, the letter was delivered at Glenellyn, Illinois, at the home of defendant, but was there received by and receipted for by his son and the registration receipt made a part of the sheriff's return so shows. Defendant testified that it was not brought to his attention, and that he first learned that such a service had been attempted in the year 1914.

The present statute upon the subject is (1 Comp. Laws 1915, § 4138):

"That if the person or persons entitled to such notice, or any of them, shall be nonresidents of this State, if from the said record aforesaid, or from inquiry, the sheriff can obtain the postoffice address of such person or persons or if said addresses be known to him, he shall either send to such nonresident person or persons a copy of said notice by registered letter, and return the receipt or receipts of the postmaster received for said letter or letters with his return to the county clerk's office, or said sheriff shall cause to be served personally on such person or persons aforesaid a copy of the said notice."

The law in force in January, 1909, was section 140 of the tax law of 1893 as amended (Act No. 142, Pub. Acts 1905) and the language was—

"he shall send to such person or persons aforesaid a copy of said notice by registered letter, and return the receipt or receipts received for said letter or letters with his return to the county clerk's office."

It is probable that the language employed in both of these sections has the same meaning, and that it refers to both the receipt given by the postmaster at the office of mailing and that given where the letter is delivered. The "receipt received for said letter" is the controlling language. In the instant case the sheriff was advised by the receipt which came back to him that the letter had been receipted for, not by defendant, nor by any one purporting to act as his agent, but by a stranger, and that the delivery appeared to have been made in violation of rules of the postoffice department. It is said, in argument, that the sheriff had the right to suppose that Wilson H. Stubbings and W. H. Stubbings, Junior, meant the same person, and was not called upon to send another notice. It must be observed that the statute does not make any return of service other than *prima facie* evidence and that the sheriff's return may be contradicted. *Winters* v. *Cook,* 140 Mich. 483; *Gogebic Lumber Co.* v. *Moore,* 157 Mich. 499. And, as was remarked by the trial judge, it is doubtful if this return is *prima facie* evidence of service upon the proper person.

It must be held that the service was not good, and that the decree should be affirmed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

OCTOBER TERM, 1918.

BREVOORT *v.* WAYNE CIRCUIT JUDGE.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—TIME TO SETTLE—EXTENSION OF TIME—STATUTES—COURT RULES.

   Under the provisions of the judicature act (section 62, chap. 18, Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12634) and Circuit Court Rule No. 66, there are three possible stages contemplated in connection with the allowance of time for settling bills of exceptions: (1) A party is always entitled to 20 days as a matter of right; (2) on the production of a certificate from the court stenographer to the effect that a transcript of the testimony has been ordered and will be furnished as soon as possible, an extension may be granted, and, if not more than 60 days is requested, may be granted on *ex parte* application; (3) on the expiration of the 80 days, on showing of good cause made by affidavit on special motion after notice to the adverse party, it is within the discretion of the court to grant a further extension; also parties may, by stipulation, within the statutory limits, arrange extension between themselves.

2. SAME—STENOGRAPHER'S CERTIFICATE.

   The statutory provision requiring the stenographer's certificate applies only to the first extension beyond the 20-day period.

3. SAME—"GOOD CAUSE" SHOWN—DISCRETION OF COURT.

   The "good cause" not being limited to the inability of the stenographer to seasonably complete the transcript, and there being nothing in the statute or court rule which deprived the judge of power to grant an extension, if sufficient cause existed, the court was in error in holding that he was without discretion, and should have decided a motion to extend the time solely on the question of whether or not good cause was shown.

4. SAME.

A showing that because of disagreement with counsel, defendant, who was 74 years of age and in feeble health, selected new counsel, that within two weeks after the transcript was received it was delivered to counsel, who, while familiarizing himself with the case, inadvertently allowed the time for settling the bill of exceptions to expire, *held*, sufficient to support an order granting a further reasonable extension of time.

Mandamus by Henry N. Brevoort and another to compel Frederick W. Mayne, acting circuit judge of Wayne county, to grant an extension of time to settle a bill of exceptions. Submitted October 8, 1918. (Calendar No. 28,437.) Writ granted October 29, 1918.

A. J. Groesbeck, for plaintiffs.

Orla B. Taylor, for defendant.

KUHN, J. Plaintiffs are seeking a writ of mandamus directing the defendant to grant an extension of time to settle the bill of exceptions in a certain case, tried before him while sitting in the Wayne circuit in June, 1917, wherein Ralph Phelps and Orla B. Taylor were plaintiffs and the plaintiffs here were defendants. The case was an action of ejectment brought to recover a strip of land on Grosse Isle, and grew out of a boundary line dispute. A verdict was directed in favor of plaintiffs on June 19, 1917. No motion was made for a new trial. The proceedings relative to the bill of exceptions were as follows:

June 21, 1917: Order entered staying proceedings for 20 days, and granting 80 days after entry of judgment to settle bill of exceptions (no certificate of the court stenographer was filed).

June 25, 1917: Judgment entered.

July 20, 1917: The order of June 21st being in violation of the provisions of section 12634, 3 Comp. Laws 1915, a stipulation was signed extending time

within which to settle bill of exceptions 60 days from entry of judgment.

July 20, 1917: Certificate issued by court stenographer that a transcript of the testimony had been ordered on June 19, 1917, and that the same would be furnished as soon as possible.

August 3, 1917: Above stipulation and certificate filed.

August 17, 1917: Second certificate of court stenographer filed, stating that he had been unable to get out the transcript and would not be able to complete it by August 19th.

August 17, 1917: Order signed by Judge Hally, of the Wayne circuit, extending the time for settling the bill of exceptions 90 days. (This order was not based on affidavit and special motion after notice to adverse party, nor on stipulation.)

August 21, 1917: Above order filed.

September 26, 1917: Motion filed to vacate and set aside above order, accompanied by affidavits.

September 28, 1917: Motion heard. Order made by Judge Hally that the time to settle the bill of exceptions should expire on October 9, 1917, unless there should have been filed prior to that date the certificate of the court stenographer that he was actually engaged in preparing the transcript and would complete the same with all convenient speed.

September 29, 1917: Certificate made by court stenographer that transcript had been ordered by defendants and all conditions complied with, and that the work of getting out the record was proceeding as rapidly as possible.

October 10, 1917: Above certificate filed.

December 24, 1917: Motion for further extension of time to settle bill of exceptions filed.

December 31, 1917: Motion noticed for hearing on January 5, 1918.

January 23, 1918: Motion and supporting affidavits, also affidavits in opposition, received by defendant at Charlevoix, together with briefs for respective parties.

January 31, 1918: Opinion and order denying motion made and signed by defendant.

February 7, 1918: Opinion and order filed.

May 15, 1918: Application for mandamus filed in this court.

In his order denying the motion, after reviewing the history of the case since verdict, defendant said:

"Reference to the dates shows that forty-one days elapsed since the last date upon which bill of exceptions could be settled under Judge Hally's order, and sixty-seven days since the receipt of the transcript of testimony was taken by the defendant and over six months since the verdict and judgment entered thereon, prior to date of making this motion.

"Law.

"Under the above facts the court has no discretion. *Guthrie* v. *Leelanau Circuit Judge,* 197 Mich. 321; *Boyne City Hardware Co.* v. *Charlevoix Circuit Judge,* 197 Mich. 374.

"In the latter case it was said:

"'It is quite clear that the discretion of the circuit judge may be exercised only within the limits fixed by the statute and the rule. * * * Parties desiring to review judgments must act seasonably and courts may exercise discretion only within the statutory limitations.'

"The motion is therefore denied."

Section 62, chap. 18, of the judicature act (being section 12634, 3 Comp. Laws 1915), provides as follows:

"The court or the circuit judge at chambers may allow such time as shall be deemed reasonable to settle such exceptions and reduce the same to form: *Provided,* That no more than twenty days shall be allowed for such purpose, except upon the production of a certificate from the stenographer of said circuit stating that the party desiring such extension has ordered a transcript of the testimony necessary for the preparation of said bill of exceptions, and that the same will be furnished as soon as possible by said stenographer. If a motion for a new trial is made within said twenty days, and such motion be denied, the time to settle a bill of exceptions may be extended

twenty days from the date of such denial without the production of such certificate."

Circuit Court Rule No. 66 contains the following provisions:

"SEC. 1. A party shall have not less than twenty days after entry of judgment or decree for the settlement of a bill of exceptions, in actions at law, or of a case containing the evidence for review in the Supreme Court in actions in equity, but the stay of execution or other proceedings during that time shall be discretionary with the court.

"SEC. 2. Subject to the limitations prescribed by statute, and upon such terms and conditions as shall be deemed just, the court may grant such further reasonable time as shall be deemed proper for a settlement of a bill of exceptions or case, and may extend such time when proper. But no more than sixty days further time shall be granted for that purpose, except for good cause shown by affidavit on special motion after notice to the adverse party, or on the written stipulation of the parties."

There are, therefore, three possible stages contemplated by the above statute and rule in connection with the allowance of time for settling bills of exceptions. To begin with, a party is always entitled to 20 days as a matter of right. There are no regulations or restrictions relating to this first stage. As to the second stage, by the express provision of statute above quoted, the extension beyond the 20 days cannot be granted, unless the applicant produces a certificate from the court stenographer to the effect that a transcript of the testimony has been ordered and will be furnished as soon as possible. On production of such certificate, an extension may be granted, and, if not more than 60 days is requested, may be granted on an *ex parte* application. If, however, it turns out that this extended period is not sufficient, there is still power residing in the court, in its discretion, to grant a further extension, provided the ap-

plication is made in the form required by the rule and good cause is shown. The rule expressly provides that when this third stage is reached (*i. e.*, when an extension beyond 80 days from date of judgment is sought), the showing of good cause must be made by affidavit on special motion after notice to the adverse party. If it is not so made, the court is without power to grant the extension. And any subsequent extension that may become necessary is of this same class and must be sought in the same manner. A party is, of course, not limited to 20 days in the first instance, nor to 60 on the first extension, but if more time is sought in either case, the provisions of the statute and the rule applicable to the situation must be complied with. There is this exception to the above regulations, that if the parties by written stipulation arrange the extension between themselves, not to exceed of course the time limited by statute, the court is not further concerned and there is then no question of lack of authority to make an order in accordance with the stipulation. The purpose of the rules is to prevent unnecessary delays by the defeated party after judgment, and the provisions are for the benefit of the opposite party.

The case of *Boyne City Hardware Co.* v. *Charlevoix Circuit Judge,* 197 Mich. 374, on which the defendant based his decision in this matter, was one which the court had attempted to extend the time beyond the first 20-day period without the production of the certificate of the court stenographer, and then, more than six months after the expiration of the 60-day extension which he had attempted to grant, a motion was made for a further extension. No stenographer's certificate was produced at this time, but one of the affidavits in support of the motion showed that the completed transcript had been delivered by the stenographer to the attorney four months before the date of the motion.

Under these circumstances, the court was clearly without authority to grant an extension.

Guthrie v. *Leelanau Circuit Judge*, 197 Mich. 321 (the other case relied upon by defendant for his decision), involved an attempted chancery appeal. The statute requiring the payment of an appeal fee to the register in chancery within 20 days after the filing of the decree was held to be mandatory and, further, to be a condition precedent to the extension of time to settle a case for appeal.

Neither of these cases meets the situation presented in the matter now under consideration. In this case a 60-day period had been properly obtained, following which a 90-day extension was allowed, and the question before us is whether or not, under the circumstances, a further extension ought to be granted. We do not overlook the fact that the order of June 21, 1917, purporting to grant 80 days' time to settle the bill of exceptions, was unauthorized and beyond the power of the court to make, the terms of the statute not having been complied with, but this defect was cured by stipulation. The defect in the order of August 17, 1917, granting the 90-day extension, in that it was not based on written motion, affidavits and notice, may be considered as cured by the proceedings in court on the motion to vacate the order, at which time, both parties being present and cause being shown, the court made another order, the effect of which was to grant a period expiring October 9, 1917, within which to settle the bill of exceptions, and if prior to that date a certain certificate of the court stenographer was filed, then the full period of 90 days as allowed by the previous order was to stand and remain in force. The required certificate was seasonably obtained, but was not actually filed until October 10th. Plaintiffs' counsel, however, raised no question on this ground and treated the extension as in force

for the full period. He had been keeping track of the progress of the transcript by direct reports from the court stenographer, and on October 22, 1917, wrote Mr. Brevoort as follows:

"I have been advised by Mr. Donaldson that he delivered about 54 pages of the testimony in *Phelps* v. *Brevoort* on October 12th and that on October 20th he had delivered the pages up to and including 277.

"In order to get the case upon the docket for the January term, it will be necessary to complete the bill of exceptions within a couple of weeks, so that the record may be printed.

"Upon the hearing before Judge Hally, I stated that I would be glad to sit down with your counsel and prepare the bill of exceptions in order that it might be completed at as early a date as possible. Since then, I have heard nothing from you.

"I am writing now to say that, unless you take the proper steps to assure the hearing of this case at the January term, I shall make a motion very shortly to limit the time for the preparation of the bill of exceptions. We are entitled to have this case heard at the January term and we must insist upon our rights."

The sole question, therefore, is as to the power of the circuit judge to grant the further extension sought in defendants' motion of December 24th. The judge's denial was based, not on an exercise of his discretion, but on the belief that under our former decisions he had no right to exercise discretion in the matter. As we have seen, in the case of *Boyne City Hardware Co.* v. *Charlevoix Circuit Judge, supra,* on which he based his decision, no certificate of the court stenographer had ever been produced, and the court was clearly without authority to grant an extension. There was a direct violation of the statutory provision. But in the instant matter, as is shown, the first grant of time beyond the 20-day period was lawfully obtained, and several certificates of the court stenographer have been produced. The statutory provision requiring the

stenographer's certificate clearly applies only to the *first* extension beyond the 20-day period. See *People* v. *Manistee Circuit Judge,* 194 Mich. 527. Not only is this the natural meaning to be given to the words of the statute, but a situation can be easily called to mind rendering a broader interpretation unreasonable. Suppose, for instance, that a 60-day extension had been granted on production of proper certificate. Without fault on the part of the stenographer, he is delayed in getting out the transcript, but finally completes and delivers it to the attorney on the 58th or 59th day of this period. The party is clearly entitled to a further extension, yet the stenographer cannot then make the certificate in the form required. So it is apparent that when this stage is reached, it is merely a matter of showing good cause by affidavit on special motion after notice. The "good cause" is not limited to the inability of the stenographer to seasonably complete the transcript. That is usually one of the causes, but it is apparent that other contingencies might arise requiring an extension. There is, therefore, nothing in the *statute* which deprived the judge of power to grant the extension, if sufficient cause existed. Nor can we find anything in the *court rule* which made it other than a case for the exercise of his discretion. In the filing of the motion, the provisions of the rule as to form and manner of presenting same appear to have been complied with. The matter would accordingly seem to resolve itself solely into a question of whether "good cause" had been shown, unless (as the opinion of the judge seemed to indicate) the fact that something over a month had elapsed between the expiration of the 90-day extension and the filing of the motion, deprived him of power to act. In the original opinion in *Kaiser* v. *Wayne Circuit Judge,* 162 Mich. 247, this court did announce such a rule, holding that the extension must

be applied for before the time already granted had expired, but, on rehearing, the opinion was modified, Mr. Justice OSTRANDER saying:

"But in so far as the opinion limits the right of the court to at any time entertain a motion, supported by affidavits, after due notice to opposing counsel, to extend the time for settling exceptions, we think it should be modified. We are impressed that in view of some former decisions of the court, a rule upon this subject should be announced only in the form of a rule to take effect in the future."

Previously, in the case of *Roach* v. *Wayne Circuit Judge,* 117 Mich. 242, this court had said:

"It is further provided that no more than 60 days' further time shall be granted except for good cause shown by affidavit on special motion after notice to the adverse party. There is no express limitation as to the time when this order may be made, and we think no such limitation need be interpolated by construction. The rights of the parties are sufficiently protected by the requirement that they shall have notice of, and an opportunity to contest, such application."

Following the *Kaiser Case,* in *Pettinger* v. *Montmorency Circuit Judge,* 164 Mich. 463, this court said:

"We are of opinion that after the expiration of the time above granted the respondent had the power, upon sufficient cause shown, after due notice to opposing counsel, to further extend the time for settling the bill of exceptions. In the recent case of *Kaiser* v. *Wayne Circuit Judge,* 162 Mich. 247 (127 N. W. 236), it will be noted that the order extending the time was made without cause being shown and without notice,"

—and after quoting the language of Justice OSTRANDER above set forth, continued:

"The above being the last expression of this court upon the subject, it must control us here."

No contrary rule has since been announced. Present Circuit Court Rule No. 66, which has since superseded former Rule No. 47, makes no change in this respect, nor is there anything in section 62, chap. 18, of the judicature act, which would operate to modify the effect of these decisions. The circuit judge, therefore, should not have regarded himself as deprived of the right to exercise discretion in the matter, but should have decided the motion solely on the question of whether or not good cause was shown.

It is manifest that "good cause" cannot be confined exclusively to delays in the furnishing of the stenographer's transcript. Suppose an attorney, after receiving the completed transcript and beginning work thereon, becomes ill. It appearing after a week or two that his illness is serious and will be of long duration, a new attorney is employed, who with reasonable promptness begins to familiarize himself with the matter. Before he can complete the preparation of the bill of exceptions, he meets with a fatal accident, and the matter must be taken up anew by a third attorney. Can it be doubted that the court has power to grant the necessary extensions to meet the situation?

In the instant case, the defendant Henry N. Brevoort is the nominal attorney of record. It appears that he is 74 years of age, that he has not been a well man for many years, and that his illness causes him to suffer from lapses of memory. He did not attempt to try the case, but employed Mr. Edwin Henderson to try it for him. During the summer or fall of 1917, a disagreement arose between Mr. Brevoort and Mr. Henderson and the latter withdrew from the case. This introduced a real and serious difficulty into the situation. Some delay might well be expected in connection with the selection of new counsel and his familiarizing himself with the matter. Little could be done to this end until the transcript was

ready. The transcript was completed by the stenographer on October 24th, and in less than two weeks, viz., on November 6th, was delivered by Mr. Brevoort to Mr. Alexander J. Groesbeck for the purpose of having an investigation made by him as to the likelihood of a reversal of the judgment entered in the cause. The transcript was a long one, the trial having been in progress from June 11th to 19th. While Mr. Groesbeck was at work on the case, it was discovered that the time for settling the bill had inadvertently been allowed to expire. A motion for a further extension was at once prepared. This was on December 24, 1917. Because of the holidays, the date of the hearing was fixed as January 5, 1918. Some further delay ensued in the effort to have the matter heard by Judge Mayne, who tried the case. The papers were finally mailed to him, reaching him January 23d. It is our opinion that such a showing might well support an order granting a further reasonable extension of time.

The writ will issue as prayed for.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, BROOKE, and STONE, JJ., concurred.

DRIER v. GRACEY.

1. LIFE ESTATES—RENTS AND INCOME, TITLE TO.
   The owner of a life estate in real property is entitled to the rents and income derived therefrom.

2. SAME—WILLS—RENTS AND INCOME, TITLE TO.
   Where a husband's will gave to the widow a life estate in both the real and personal property, with the power to use from the *corpus* of the estate, if necessary, for her reasonable care and support, but which privilege was

See notes in 6 L. R. A. (N. S.) 1186; 36 L. R. A. (N. S.) 835; 39 L. R. A. (N. S.) 805.

never exercised, *held*, that the rents and income derived therefrom was her sole property, and on her death belonged to her estate.

3. CANCELLATION OF INSTRUMENTS—DEEDS—INCOMPETENCY—UNDUE INFLUENCE—FRAUD.

On a bill by plaintiff against the estate of his foster mother to have certain conveyances of a farm between the latter and himself set aside on the ground of plaintiff's incompetency, undue influence and fraud, where by the will of the foster father the widow was devised a life estate in the farm and at her death the title was to vest in plaintiff and an adopted daughter, but the widow bought the interest of the adopted daughter and sold the farm to plaintiff, later, at his request, purchasing it back from him, evidence *held*, insufficient to establish plaintiff's incompetency, or that he was unduly influenced or defrauded either in the purchase or sale of said farm.

Appeal from Montcalm; Davis, J. Submitted April 3, 1918. (Docket No. 19.) Decided December 27, 1918.

Bill by Henry Drier, guardian of Frank Larsen, against James Gracey, administrator *de bonis non* of the estate of Mathias Larsen, deceased, and others, for a construction of the last will of Mathias Larsen, to set aside certain conveyances, and for an accounting. From a decree for plaintiff, defendants appeal. Reversed, and bill dismissed.

Rarden & Rarden, for plaintiff.

N. O. Griswold (*M. V. Cook*, of counsel), for defendants.

BIRD, J. Mathias Larsen was the owner of 120 acres of land in the township of Eureka, Montcalm county, upon which he resided with his wife and two adopted children, Flora and Frank Larsen. In December, 1890, he died testate. The two provisions of his will which are in dispute are as follows:

"I give, devise and bequeath to my beloved wife, Mary Larsen, all my real estate, lands, tenements, and hereditaments, of every kind and nature, wherever the

same may be situated, and all my personal estate, goods, chattels, moneys and effects, of every kind and nature, for and during her natural lifetime and until her decease, after the payment of my just debts and expenses of the last sickness and funeral (if any such there be). It being my will that my said wife shall and I do hereby give to her the privilege and power of disposing and conveying away any portion of said real or personal estate that may be necessary to be disposed of for her support, maintenance and comfort so long as she shall live provided the increase and rents and profits of the same estate shall not be sufficient for that purpose and also the right to turn off and dispose of such of said personal estate as shall to her seem best on account of age or wear and tear substituting others in the place and stead of the same, or keeping it good by increase, hereby giving to her full power to manage the same according to and dispose of it as in her judgment seems best.

"*Secondly:* The rest and residue and remainder of my said real and personal estate, goods, chattels and effects after the decease of my said wife I do hereby give, devise and bequeath to Frank Larsen and Flora L. Larsen, adopted children of mine to be divided between them share and share alike."

The will was admitted to probate and Mary Larsen, his widow, qualified as executrix and took charge of the estate. For two years she rented the farm. After that she and Frank, the adopted boy, worked and managed it. In 1895 the adopted daughter, Flora, having married, was desirous of disposing of her undivided half in the farm subject to her mother's life estate, so her mother purchased it for $1,000. In 1900 Frank married and brought his wife to the home. It soon became evident, as it usually does, that the house was too small for both families, and as a result the mother offered to purchase Frank's interest for $1,500, or to sell hers for $1,500, reserving certain timber of the estimated value of $500. Frank elected to, and did, purchase her interest in the farm, giving her a mortgage thereon for $1,500. At the end of the sec-

ond season Frank became dissatisfied and wanted to sell the farm, so the mother purchased it, giving him $900 in cash and canceling the $1,500 mortgage, and as a further consideration permitted him to retain all of the household goods and personal property on the farm in which she had an interest, amounting in value to over $600. Mary Larsen returned to the farm and operated it until October, 1907, when she sold it on contract to George W. and John F. Nelson, for $4,000. Mary Larsen then purchased a home in the city of Greenville, where she resided until her death, in September, 1912. She died testate, leaving her estate to a brother and to the children of a deceased brother.

With the $900 paid by his mother and $750 which he had accumulated from the avails of the farm, Frank purchased 40 acres nearby, known as the Slattery farm, and moved onto it. In 1904 he traded this 40 acres for the Shearer farm, consisting of 80 acres. In 1907 he sold 40 acres of the Shearer farm and paid his mortgage. In 1911 he traded the remaining 40 to one Cooper for another 40 in the same township. This trade with Cooper Frank soon regretted. It was not an advantageous one, and he was very desirous of getting rid of it. Some time in 1911 Frank was declared mentally incompetent by the probate court, and a guardian was appointed. Steps were taken by the guardian to rescind the trade with Cooper. Litigation followed in which Frank was successful in recovering the 40 acres which he had traded to Cooper. Frank then returned to that farm and still resides there.

Soon after the conclusion of that litigation this bill was filed. The estate of Mathias Larsen was revived, an administrator *de bonis non* was appointed, and made a party defendant herein. Lars Peter Petersen, executor of the estate of Mary Larsen, was made a party defendant, as well as Anna Christensen, administratrix of the estate of Frederick Christensen. Christensen was a brother of Mary Larsen. She gave to

him one-half of her estate, and to the other four defendants, who are children of a deceased brother, the other half.

The bill seeks to have all the assets of the estate of Mary Larsen declared to be assets of the estate of Mathias Larsen, and also prays to have set aside the conveyances between Frank and his mother, on the ground that Frank was not mentally competent to transact such business, and on the further ground that he was defrauded by his mother and Frederick Christensen.

The chancellor found that Frank was mentally incompetent at the dates of the conveyances, that he was unduly influenced to make the last deed by his mother and Christensen, and, therefore, set them aside. The construction which he placed upon the will of Mathias Larsen was that it gave a life estate to Mary Larsen, with the privilege of using from the *corpus* of the estate, if necessary, for her support, and that the income or accumulations from the life estate, which were unused at her death, belonged to the estate of Mathias Larsen.

The questions which are submitted to this court for its consideration are two:

(1) The construction of clauses 1 and 2 of the will of Mathias Larsen.

(2) Whether the conveyances between Frank and his mother should be set aside on the ground of Frank's mental incompetency.

1. It is conceded that Mary Larsen had no means of her own at the time of her husband's death. It is also conceded that the funds used by her in purchasing the interest of the children were derived from her life estate. When these purchases were made she was assisted financially by her brother, Frederick Christensen. When she finally sold the place the balance due him was paid from the Nelson contract.

The language of the will is not ambiguous. It very

clearly gives Mary Larsen a life estate in both the real and personal property, with the power to use from the *corpus* of the estate, if necessary, for her reasonable care and support. This construction is supported by the following authorities: *Glover* v. *Reid*, 80 Mich. 228; *Jones* v. *Deming*, 91 Mich. 481; *Gadd* v. *Stoner*, 113 Mich. 689; *In re Moor's Estate*, 163 Mich. 353; *Bateman* v. *Case*, 170 Mich. 617.

It appears to be conceded that the personal property was exhausted in paying the debts, so we may dismiss that from our consideration. As owner of a life estate in the real estate she was entitled to the income and rents. These belonged to her to do with as she saw fit. This is the general rule. *Braswell* v. *Morehead*, Busbee's Eq. (45 N. C.) 26 (57 Am. Dec. 587, and note); *Millen* v. *Guerrard*, 67 Ga. 284; 17 R. C. L. pp. 628, 629.

In the last authority cited, it is said:

"As a general rule the life tenant is entitled during the continuance of the life estate to the entire income from the property, real or personal, in which he has a life interest, but he has no right to use the *corpus*. * * *

"The rents received from real estate during the existence of the life estate belong to the life tenant, and it has been held that a bonus paid during the continuance of the life estate for the extension of a lease also belongs to the life tenant as of the time when it was made."

We perceive no reason why this general rule should not apply to the life estate which was given to Mary Larsen by her husband's will. The language of the will indicates that the intention of the testator was in accord with this general rule. He gave her a life estate in all of his property with no restrictions as to income. As such legatee she was entitled to the possession of the estate, and had title to whatever income it yielded. If she were the absolute owner of a life estate in the farm she must have been entitled

to what it produced. After her husband's death she remained on the farm, and by her industry and thrift saved nearly enough to purchase the interests of the adopted children, and at her death left property of the value of $2,650. The contention is now made that this sum belongs to the estate of her deceased husband because it is income from her life estate. We cannot approve of this conclusion. The general rule of law does not so decree. The language of the will does not so order, and simple justice does not so demand. Neither are we able to agree with plaintiff's contention that the situation is ruled by the cases of *Hull* v. *Hull*, 122 Mich. 338, and *In re Mallary's Estate*, 127 Mich. 119.

In *Hull* v. *Hull*, the testator created a trust fund of all of his property and provided that during his widow's natural life she should have it as needed for her support and comfort, and named trustees to see that the provision was carried out to the letter.

In *Re Mallary's Estate*, the testator did substantially the same as was done in *Hull* v. *Hull*, except that the widow was made the sole trustee and was not required to give bond.

In the present case Mary Larsen was given a distinct estate for life—a freehold estate. If the estate were hers for life the income was hers. Mathias Larsen made no attempt to control the income from the life estate. He directed that if the income were insufficient to properly care for her she should have the right to sell and use from the *corpus* of the estate, but this privilege she never exercised. These differences make the cases cited easily distinguishable from the present one.

Our conclusion is that the will gives to Mary Larsen a life estate in the property, both real and personal, of Mathias Larsen, and that the rents and income derived therefrom during her life belonged to her, was her sole property, and now belong to her estate.

2. Should the conveyances between Frank and his mother be set aside? Frank Larsen, at the time of the trial, was 51 years of age. He had been a farmer all his life. When a young man his foster father died. He took charge of the farm and managed it, and his foster mother kept the house, and the record shows that he has been reasonably successful as a farmer. All the witnesses agree that he is not bright, that he is peculiar, that he is quick tempered, and when angry is boisterous and says and does foolish things. He married late in life and was, at least before marriage, addicted to the habit of self abuse. It also appears that he was troubled at times with what he called "blue spells" and complained that his head felt bad and was not right.

Several witnesses appeared on behalf of plaintiff. Some of them were neighbors, others were business and professional people of Greenville, with whom he had come in contact, either in a business or social way. Nearly all of them gave it as their opinion that he was not mentally competent to have the charge of his own affairs. Several near neighbors who had known him from childhood expressed the opposite opinion. Some business and professional people with whom he had done business in Greenville, also expressed an opposite opinion. All of the witnesses for the defendants, and some of those who appeared for the plaintiff, admitted that they had never heard his ability to manage his own affairs questioned until his litigation with Cooper. It would be unprofitable to analyze the testimony of each witness, but we may, with some profit, refer to certain impressions which we have received in reading the voluminous record.

(*a*) While most of plaintiff's witnesses expressed the opinion that Larsen was not competent to have charge of his affairs, the reasons which they gave for thinking so are not very satisfactory. The record

shows without dispute that Frank had bought and sold several farms, had worked and managed them, and marketed the produce, and the only competent proof of specific instances in which he had made bad bargains was the real estate deal with Cooper and one horse trade.

(*b*) At the time of the hearing of this case Larsen appeared to be unfriendly toward his guardian. He testified in the case, and this attitude subjected him to a severe cross-examination by his own counsel. The examination was one well calculated to develop his mental weaknesses, if he had any. During his examination he was able to, and did, take care of himself as well as any other witness in the case. His answers indicated that he comprehended the questions, answered the precise question asked without elaboration, and drew some very nice distinctions. Neither his direct nor cross-examination gives any hint that he was mentally incompetent at the time of the trial. It should be mentioned in this connection that plaintiff's counsel concedes that he was unusually lucid on that occasion.

(*c*) After trading farms with Cooper, Larsen appears to have regretted it and worried over it to the extent that he could not work. He wanted to trade back but Cooper refused. He induced his uncle to intercede for him but this was of no avail. He consulted with his friends and some one suggested to him that an effective way to get his property back was to have himself declared incompetent by the probate court. This appealed to him and he set about to have this done. His wife made the application and he solicited witnesses to swear that he was incompetent. Two physicians were asked to examine him. They did so, and made a report that nothing was found indicating that he needed a guardian. They were not called to testify at the hearing. In the suit with Cooper he again solicited witnesses to testify that he

was incompetent, as he stated to them, so that he could get his place back. It is not usual for persons who are really suffering from this malady to capitalize it in this manner. It is very unusual for one who is in this unfortunate condition to solicit witnesses to testify to the fact. While these acts on his part are not conclusive of his competency they show a mental grasp and resourcefulness which throw suspicion on the claim that he is mentally incompetent.

(*d*) We have been influenced to some extent in reaching a conclusion on this question by the testimony of Dr. Johnson, who was called upon to make an examination of Larsen, prior to his being declared incompetent by the probate court, and who did make the examination in company with Dr. Bower. Dr. Johnson testified upon the hearing of this case. His testimony in part follows:

"I think our examination that day covered about an hour's time; we talked with him a good deal during that period.

"*Q.* What range of subjects did you talk about?

"*A.* First I think we went into his history as carefully as we could, relative to where he was born, the history of his family, his elemental training, what school training he had had, we questioned him relative to work he had while in school, the studies he pursued; questioned him relative to various details in history for instance; we asked him a few things in mathematics; we questioned the man relative to his habits, in other words took a very close personal history as we could get it that length of time; tried to draw out the fact that he had some hallucinations, illusions or delusions; we went into his physical condition. I remember we talked to him relative to various matters of judgment, relative to farming; the best time to buy a farm, how he would judge a good farm, the best time to sell crops, the best time to harvest crops, the best time to plant them, various ideas relative to farming. We went into the matter of his physical condition, asked him various questions about that, about sleeping, appetite and other things; his memory, we tried to test out his memory, general condition. I

think that about covers the field as near as I can remember.

"We did not that day observe any indications of hallucinations. We observed that he has some peculiarities of speech. We did not examine to ascertain what caused that peculiarity of speech.

"*Q.* When you got his speech so you understood his talk, or his reply, you say it was sane and all right?

"*A.* We didn't find anything wrong with him."

We conclude that the most that can be claimed for the testimony bearing on the question of mental capacity is that Frank Larsen was a man somewhat below the average intelligence, that he was peculiar in many ways, and that he had lessened his physical and mental vigor to some extent by his unfortunate habit, but we do not think the record as a whole establishes the fact that Larsen was mentally incompetent to have the care and charge of his own affairs. Notwithstanding all the speculations with reference to his capacity, the fact remains that he has been a farmer all of his life, has worked and managed his own farms, made his own deals, and done his own marketing, and did it as well and successfully as it is usually done, and that he is still living on a farm of his own, worth from $1,500 to $1,800, with no debts, and managing it and working it without the aid and judgment of any one but himself. We must conclude, therefore, that the charge of mental incompetency is not sustained.

On the remaining question we find nothing in the record which convinces us that Frank was unduly influenced or defrauded either in the purchase or sale of the old farm. He testified that he concluded he would rather have a smaller farm and be free of debt, and beside he felt his mother should have the home farm. If it can be said that Frank did not receive full value for the farm when he sold it to his mother, we think it is equally true that she did not receive

full value when she sold it to him. When he left the farm he had $900 in money paid by his mother, $750 which he had made during the time that he owned it, and all the personal property including the household goods and farm machinery.

We are of the opinion that the decree should be reversed and plaintiff's bill dismissed, with costs of both courts to the appealing defendants to be taxed against the plaintiff personally.

In granting costs against the guardian personally we do so feeling that he did not institute and carry on the litigation with the good faith which is demanded of an official in a trust relation. Frank Larsen testified that he was opposed to the litigation and did not want it carried on. The guardian testified that Frank was not consulted before the suit was brought, that he did not approve of it, that he became angry because it was instituted and that it was carried on against his protest. This testimony, considered in connection with the merits of the controversy, has led us to the conclusion already announced.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with BIRD, J.

OSTRANDER, C. J. (*dissenting*). I concur in reversing the decree of the court below but not in the conclusion that the guardian, plaintiff, should personally pay the costs. The court below granted the relief prayed for. So far as the probate records are concerned, they show a regular appointment of the plaintiff as guardian. The fact that the guardian of an incompetent is not governed by the advice of his ward does not, in my opinion, furnish a reason for subjecting him to the payment of the costs of unsuccessful litigation instituted by him in his ward's behalf. I find no evidence of the bad faith of the guardian.

MISNER *v.* STANGE.

1. APPEAL AND ERROR — IRREGULARITY — MOTION TO DISMISS — WAIVER.
   In the absence of a motion to dismiss an appeal in the Supreme Court on the ground of irregularity, the question will be regarded as having been waived.

2. LIENS—NOTICE TO PURCHASER—AGREEMENT TO PAY.
   Held, that the purchaser of a farm knew of certain liens and agreed to assume and pay them as part of the purchase price.

3. SAME—CONCURRENT LIENS—ATTORNEY'S FEES.
   Where plaintiff in divorce proceedings was granted a decree including alimony and attorney's fees, which were made a lien upon defendant's farm, already incumbered by a mortgage, the lien of defendant's attorney for his fees, *held*, not concurrent with the lien of plaintiff's attorney, since, if the farm should sell for only enough to pay the mortgage and the alimony, the effect would be to compel plaintiff to pay a portion of defendant's attorney fees.

Cross-appeals from Ottawa; Cross, J. Submitted January 18, 1918. (Docket No. 145.) Decided December 27, 1918.

Bill by Charles E. Misner against Claus H. Stange, Walter I. Lillie, and Anna Wegner for the foreclosure of certain liens. Defendants Lillie and Wegner filed separate cross-bills asking affirmative relief. From the decree rendered, defendants Lillie and Wegner appeal. Modified, and affirmed.

Charles E. Misner, in pro. per.

Leo C. Lillie, for defendant Lillie.

Soule & Soule, for defendant Wegner.

BIRD, J. This controversy with its variety of angles is the outgrowth of a desire upon the part of Claus

H. Stange to take unto himself many wives and to their persistency in employing counsel to fight for their freedom and alimony.

In the year 1909 Mr. Stange was the owner of an 80-acre farm in Ottawa county, upon which he resided with his wife. In October of that year he placed an incumbrance thereon of $500 running to the Grand Haven State Bank. Some time after the execution of the mortgage Mrs. Stange died, and later Stange married Albina Roetter. She lived with him only a few months when she filed a bill for divorce on the ground of extreme cruelty, and at the same time commenced a suit in replevin to recover her household goods. In these cases the plaintiff was represented by Walter I. Lillie and the defendant by Charles E. Misner. The divorce proceedings resulted in May, 1913, in a decree for plaintiff and an allowance of alimony and costs amounting to $518.81. This sum was made a lien on the north half of said 80 acres which included the homestead, subject to the bank mortgage.

Stange failed to pay the alimony as directed and Mr. Lillie began proceedings to foreclose the lien. In this suit Stange was made a party defendant and was represented by Mr. Misner. Pending these proceedings Misner purchased the decree for alimony from Mrs. Stange and took an assignment thereof to himself. When this came to the attention of Mr. Lillie he insisted the suit should not abate on account of the assignment to Misner but should proceed for the purpose of enforcing his lien for attorney fees and disbursements which were included in the decree. The court held that the assignment, as against Lillie, was void, and that Lillie might proceed to foreclose the lien to the extent of his attorney fees and disbursements which were included therein, and authorized a sale to be made of the premises, by a circuit court commissioner, at any time after September 1, 1914.

In pursuance of this order notice was given of the sale. A few days prior to the sale Misner filed a motion to amend the decree of sale and secured an order from the court adjourning the sale. Some misunderstanding arose over the service of the order of adjournment and the sale proceeded and the premises were bid off by Leo Lillie for the amount of the lien plus the costs and expenses of sale, amounting to $213.96. Subsequently Misner's motion was heard and the decree in the foreclosure case was amended giving Misner the right to foreclose the lien for alimony to the extent of $260, the amount which he had paid for the assignment. Mr. Leo Lillie then, on behalf of Mr. Stange, tendered to Mr. Misner the sum of $274.09, which was supposed to cover what Misner paid for the decree, together with the interest thereon. Mr. Misner refused to accept this, claiming it was insufficient. Following this Mr. Leo Lillie, representing Mr. Stange, filed a bill in chancery to compel a cancellation of the decree for alimony and a discharge of the lien, and also claimed the statutory penalty of $100 for Misner's refusal to discharge the lien when tendered the amount due thereon. Misner answered the bill and claimed the benefit of a cross-bill. This suit resulted in giving Misner a lien of $260, the amount which he had paid for the alimony and an additional sum of $238.10 for professional services growing out of the divorce proceeding, and both were made a lien upon the 80 acres.

Before the complications attending Stange's second marriage and divorce had been ironed out he married again, this time Marie DeRege. He soon quarreled with her and she employed Misner to file a bill for divorce. This was subsequently granted and she was awarded $150 alimony and the same was made a lien upon the 80 acres in question. This decree was subsequently assigned to her counsel, Misner, and later

he assigned it to Walter I. Lillie. About this time a levy was made upon the 80 acres to enforce the collection of a judgment for $264.75 and interest, which had been rendered against Stange and in favor of one Lexow some time in 1911.

Stange, having gotten rid of wife number three, advertised in a Chicago newspaper for a housekeeper. This was answered by Anna Wegner, who came onto the scene and soon thereafter arrangements were made by which she and Stange were to be married. This was prevented, however, by the order of the court in the decree of divorce granted to Marie DeRege Stange, prohibiting the re-marriage of Stange within a year from the date of the decree. Before the year was up Anna Wegner concluded that she would not marry Stange but did conclude to buy his farm. She was possessed of some means and during the time she kept Stange's house she advanced money to the extent of $1,200, as she claims, to take care of certain indebtedness of Stange's. In consideration of this and of her labor a conveyance of the farm was made to her by Stange subject to the foregoing liens. At this stage of affairs it looked as though the liens would be paid and the numerous lawsuits disposed of, but other attorneys became interested in the litigation and the negotiations came to an end without anything being accomplished by way of compromise.

The prospect for peace having failed, Leo Lillie served the interested parties with notice to show cause before the court why the sale to him of the north 40 by the circuit court commissioner should not be confirmed. In response thereto much cause was shown and the chancellor was of the opinion that the sale should not be confirmed. As matters were becoming more complicated daily and the number of suits increasing, the chancellor suggested the present proceeding so that all parties would be before the court,

in which event their respective claims could be passed upon and determined. After a review of the proceedings herein referred to, and other suits and assignments not herein mentioned, the chancellor reached the conclusion that the best interests of all would be better conserved by selling the farm as one parcel for the purpose of satisfying the liens against it, and that when sold the proceeds should be disposed of in the following order:

1. The costs of the sale including the clerk and sheriff's fees in this case.
2. To Charles E. Misner, assignee of the mortgage to the Grand Haven State Bank, the amount of said mortgage and interest thereon.
3. To Walter I. Lillie and Charles E. Misner, their concurrent liens, *pro rata*, if necessary, and the interest thereon. The lien of Walter I. Lillie being the one awarded him in the case of Albina Roetter *v.* Claus H. Stange, and the lien of Charles E. Misner being the one awarded to him in the case of Claus H. Stange *v.* Charles E. Misner.
4. To Walter I. Lillie, as assignee, the lien awarded in the case of Marie DeRege Stange *v.* Claus H. Stange and interest thereon.
5. The Lexow judgment and interest.
6. The surplus to be paid to Anna Wegner.

From this decree Walter I. Lillie and Anna Wegner have appealed. The pleadings in this case as well as the briefs in this court are filled with charges and countercharges of bad faith, fraud, robbery and unprofessional conduct. Especially is this true of the brief of counsel for Mrs. Wegner. We shall not attempt to discuss these charges further than to say that in our opinion they are not sustained by the record. After draining off the bad blood which has been engendered by this litigation from its inception, the residuum presents the following questions:

1. Some claim is made that the appeal of Walter I. Lillie was not taken in season and, therefore, is ir-

regular. The record shows that the "case made" by Mr. Lillie was settled by the trial court and his briefs are filed in this court. In view of the fact that no motion has been made by counsel in this court to dismiss the appeal, the irregularity, if one exists, must be regarded as having been waived by counsel.

2. Anna Wegner complains: (*a*) Because of the allowance of Walter I. Lillie's lien for professional services in the divorce case of Albina Stange *v.* Claus Stange. (*b*) Because of the allowance of the DeRege lien for alimony. (*c*) Because of the allowance of the Lexow judgment. These liens were owned by Walter I. Lillie and the judgment was represented by him as attorney. Without entering into a discussion of the charges made in connection with these matters we will content ourselves by saying we think the liens are valid. They were made in proceedings in which the court had jurisdiction and the right to declare them, and no party in interest has appealed therefrom. There is no claim that the Lexow judgment is not valid nor is there any claim that it has been paid. We are satisfied from the record that Mrs. Wegner knew of these several liens and also of the judgment, and that she agreed to assume and pay them as a part of the purchase price of the farm.

3. Mr. Lillie complains because Misner's claim for attorney fees was secured by a concurrent lien with his in the divorce case. Mr. Lillie appeared for plaintiff. She was successful and was granted alimony in the sum of $518.81. This sum included attorney fees and disbursements of Mr. Lillie amounting to $141.26. We are of the opinion that Mr. Misner's claim for $260, the amount he paid Mrs. Stange for an assignment of the decree, and the amount of Mr. Lillie's claim for services and disbursements should be made concurrent liens because both items are represented by the decree for alimony of $518.81. But we do not

think that Misner's attorney fees in that case should be secured by a concurrent lien with the amount granted as alimony, or with any of the items which made up that alimony, for the reason that should the farm sell for only enough to pay the mortgage indebtedness and the decree for alimony, the decree in this case, as it now stands, would have the effect of reducing the decree for alimony and compelling plaintiff in the divorce case to pay a portion of defendant's attorney fees.

The decree may be modified in this respect and affirmed. Defendant Lillie will recover his costs in this case, the same to be taxed against plaintiff Misner and defendant Wegner.

OSTRANDER, C. J., and STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. MOORE, J., did not sit.

McCULLEY v. RIVERS.

1. BROKERS—PRINCIPAL AND AGENT—GOOD FAITH—FRAUD.
   It is the duty of an agent or broker to act towards his principal in entire good faith, and he is bound to disclose to the principal all facts within his knowledge which might be material to the matter in which he is employed.

2. SAME—PRINCIPAL AND AGENT—ATTORNEY AND CLIENT.
   The fact that the broker dealt with his principal through an attorney did not excuse the broker from his duty to his principal; nor would lack of diligence on the part of the attorney to verify his representations or discover imposition or fraudulent conduct of the broker, whether active or passive, excuse the latter.

3. SAME—DOUBLE AGENCY.

A broker may, with knowledge and consent of buyer and seller, lawfully act as agent for both.

4. SAME—LAND CONTRACTS—UNDISCLOSED DOUBLE AGENCY—VOIDABLE CONTRACTS.

Where a broker represented both buyer and seller to the disadvantage of the latter, in the sale of real estate, without disclosing his double agency to the seller, the contract was voidable at the option of the latter.

5. SAME—VOIDABLE CONTRACTS—FRAUD.

It is not necessary for a party seeking to avoid a contract on the ground of undisclosed double agency to show that any improper advantage has been gained over him; he may repudiate or affirm the contract irrespective of any proof of actual fraud.

Appeal from Wayne; Chester, J., presiding. Submitted April 2, 1918. (Docket No. 8.) Decided December 27, 1918.

Bill by Irving G. McCulley against Addie Rivers for the specific performance of a land contract. Defendant filed a cross-bill to rescind the contract on the ground of fraud. From a decree for defendant, plaintiff appeals. Affirmed.

Stellwagen & MacKay, for plaintiff.

Ormond F. Hunt, for defendant.

STEERE, J. Plaintiff's bill of complaint was filed to enforce specific performance of a land contract dated January 14, 1915, in which defendant agreed to sell and convey to him a parcel of land in the city of Detroit known as No. 48 Adams avenue east, for the sum of $15,000, payable $100 down and the balance upon delivery of the deed with abstract of title on or before February 15, 1915, or as soon thereafter as conveyance could be perfected. The instrument is a short and plain land contract, the only variation from standard form being a provision that:

"The vendor agrees that Walter C. Woolley is the broker who has brought about this sale, and agrees to pay said broker his commission of four hundred and fifty ($450) dollars."

Signed by the contracting parties, its execution is witnessed by W. C. Woolley and C. H. Gleason, who were the active representatives participating in the transaction.

Defendant filed an answer of denial, with cross-bill alleging that, through the connivance of Woolley and plaintiff, advantage was taken of her nonresidence and ignorance of real estate values in Detroit to fraudulently induce her by false representations as to the value of said property to sign a contract to sell the same for less than half its then actual market value; but that upon learning soon thereafter of the concealment and deception she promptly disaffirmed and repudiated the contract, giving notice thereof, on March 3, 1915, to plaintiff and his agent in the transaction, tendering back to both of them the $100 she had received, which they refused to accept but is still kept good by offer to pay the same into court, praying for dismissal of plaintiff's bill under her answer and cancellation of the contract as affirmative relief under her cross-bill.

Plaintiff answered her cross-bill and the case was thereafter heard before the circuit court of Wayne county in chancery on pleadings and proofs taken in open court, resulting in a decree denying specific performance and granting defendant the affirmative relief asked in her cross-bill.

Defendant became owner of this property under the will of Mrs. Helen Smith, a cousin of her mother, who died in Detroit on September 14, 1911. W. C. Woolley, who was in the real estate business in Detroit and had done work in that line for Mrs. Smith during her lifetime, was named as executor of her will. Upon

the same being presented for probate a notice of contest involving a codicil of the will was filed by a party in interest named Jennie Summers and the proceeding certified to the circuit court of Wayne county, where the case was pending for some time with a preliminary motion, preparations for trial and negotiations for settlement, which ultimately resulted in an adjustment of the differences out of which the contest arose and withdrawal of opposition, when the case was certified back to the probate court where the will was admitted to probate, in the fall of 1913, and Woolley as executor proceeded with administration of the estate.

The case yet lingered in the probate court when the contract in question was executed in 1915. Defendant had engaged C. H. Gleason, an attorney of Grand Rapids, to look after her interests in the estate, and while neither she, nor he as her attorney, was directly connected with the will contest, he went to Detroit in relation to the matter several times as her representative and learned in a general way the status of the estate, conferring with Woolley and the attorneys in the contest and helping as he could in the efforts to effect a settlement of the delaying litigation in order that defendant might secure possession of her share of the estate as soon as possible. He consulted and corresponded with Woolley from time to time, who the record indicates was active in the will contest and familiar with the affairs and assets of the estate, including this property which he had collected the rents upon and looked after for Mrs. Smith in her lifetime, continuing to do so for the estate after her death.

Defendant was not a business woman and knew nothing of real estate transactions or values in Detroit. She learned that Woolley was executor of the estate and that there was a will contest, but her knowledge of the progress of the probate proceedings and

value of the property left her was from or through Gleason who, as he testified, relied chiefly upon Woolley for information relative to the situation and assets of the estate, which he communicated to defendant as it came to him, including Woolley's proposals to sell this property for her and representations as to its value.

During the time this estate was in the courts and for years before, both plaintiff and Woolley were connected with or employees of a real estate activity in Detroit known as the Hannan Real Estate Exchange or Agency. Plaintiff testified that Woolley "was a broker in the Hannan Real Estate Agency," having been "a faithful employee of Mr. Hannan's" for many years, and that he (plaintiff) had been for several years "general manager of the apartment hotels operating for the Hannan Real Estate Exchange"; that Woolley, who he knew was executor of the Smith estate, twice proposed to him that he buy this property, stating the second time that he could sell it to him for $15,000 and plaintiff agreed to take it, stating, "I would not have bought this property had it not adjoined property in which my associate, Mr. Hannan, was interested." On cross-examination he further said:

"It was not necessarily essential that Mr. Hannan should get this lot to round out his property, but it would have been a good thing, inasmuch as Mr. Hannan and I had thought of building a hotel. * * * I had that in mind when I swore in the bill it was of peculiar value to me. There is a question of money involved, although, to a certain extent, it has a special value because Mr. Hannan owns the property all around it. I was associated with Mr. Hannan in this transaction, but there was nothing said to him about this property until after I completed the deal with Woolley. * * * I have lost nothing through having the abstract made, I am just out the $100 deposit money."

When Gleason visited Detroit in defendant's interest he examined with Woolley the appraisal in the probate proceedings and the tax assessor's valuation of this property and testified that Woolley, who he learned was in the real estate business and connected with the Hannan Exchange, told him the appraisal of $13,400 was above the actual value, the property being worth really about $10,000, and said he would like to act as their agent,—would look after it and when they got ready to sell he would get all it was worth for them as he knew real estate values in Detroit; that he believed Woolley's statements and assurances and did not otherwise seek to ascertain values, saying:

"I thought he was looking for our interest and, as administrator looking for the interests of all the beneficiaries in the will; and especially ours, because he had asked, said, he thought he could find a purchaser for the property, and he could sell it for all it was worth. * * * He continued collecting rents during 1912 and 1913 and up until about July, 1915."

With their relations thus established, a noticeable feature of the events leading up to the contract in controversy is that the offers and activities looking to sale of this property, which was in Woolley's hands as executor and under his control as an asset of an estate in process of probation, emanated from him; and in his communications with plaintiff, to or through her attorney in Grand Rapids, he not only depreciated its value below the probate appraisal and assessed valuation, but, as Gleason testifies, never at any time advised them of activity or increase in value of real estate in Detroit which the testimony shows was taking place during the time this property was in his hands, and to a marked degree in the vicinity of Grand Circus Park near which it is located. A petition was filed by him, as executor, in the probate court on February 6, 1914, asking for allowance of a special ac-

count for attorney fees in connection with the will contest, etc. The account began with drawing a petition for probate of the will, for appointment of a special administrator and other preliminaries, without date, followed by many dated items the first of which, dated September 1, 1911, is for "conference between your petitioner" and the attorneys. In apparent explanation and justification of the account this petition states amongst other things:

"that the real estate in the city of Detroit is now of greater value than $71,000 [the probate appraisal], said real estate having during the past two years considerably increased in value, part of the same being situated at No. 49-51 Adams avenue east, * * * said land being situated in the district where values have largely increased of late; that in your petitioner's opinion, the present value of said real estate is approximately $100,000." * * *

This account was allowed by the probate court as filed.

It is not shown that defendant or her attorney, both living in Grand Rapids, had manifested or entertained any intent or desire to sell this property while proceedings involving it were pending in the probate court, except as Woolley agitated the subject from Detroit and made proposals, mostly by correspondence, through attorneys of the estate or his own letters. His first prospective purchaser was Mr. Hannan and the first proposition was in a postscript to a letter from attorneys who represented the estate to Gleason, dated April 13, 1914, as follows:

"P. S.—Mr. Woolley says that Mr. W. W. Hannan will pay $10,000 for No. 48 Adams avenue east (stating terms of payment); would Mrs. Rivers care to entertain this proposition?"

To this Gleason replied he would send the letter to her, but in view of the appraisal he would not advise her to take less than $15,000, a proposition he thought

she might consider. On May 15, 1914, the attorneys again wrote Gleason relative to certain matters touching the estate, stating in closing that Mr. Woolley wanted to know at what price defendant would sell the property, and concluding, "he says that Mr. Hannan would pay $500 or more down and the balance in cash as soon as the estate is closed." Gleason replied that she was undecided, but he was inclined to advise her to sell for $15,000, and saying: "Let me know what you think it is worth and what it ought to sell for. The executor has had charge of it so long he ought to be a good judge of the present value." Counsel for the estate replied to this letter on June 5, 1914, saying in reference to this inquiry: "I will further take up with Mr. Woolley the selling value of No. 48 Adams avenue east and write you in a few days," followed by a reply to other inquiries in which he was informed that defendant's share of the cost of administration, including her proportion of the Summers' settlement, amounting to $1,098.40, would more than absorb anything coming to her from rent of the property. It does not appear that counsel for the estate communicated further with Gleason as to the sale, or the "present selling value" of the property, but the executor thereafter communicated direct with Gleason, at one time visiting him in Grand Rapids to get defendant's price for Hannan as a prospective purchaser, at which time he stated the property was not worth more than ten or twelve thousand dollars. Of that interview Gleason testified:

"I replied that Mrs. Rivers said she wanted ($15,000) fifteen thousand dollars, that price was put on it because both I and Mrs. Rivers wanted that much out of it and because it was a little more than Mr. Woolley appraised it. I got no information other than through Mr. Woolley up to that time, nor had I investigated myself other than I have related with Mr.

Woolley. In fixing the sale price I relied upon what Mr. Woolley told me."

On the following day, July 24, Woolley wrote Gleason from Detroit referring to their conversation of the previous day and said:

"I neglected taking up my end of the transaction. That is this—I am acting in the capacity of broker, and in case a deal should be made for Miss Rivers' property I would expect the usual board rate of commission to be paid me for consummating the sale. The board rate of commission is three per cent. on improved property."

To this Gleason replied in part:

"I am satisfied Mrs. Rivers would wish $15,000 net for the property, so you better add $500 to the selling price and get your commission in that way, and at the same time leave $50 for my trouble."

Woolley replied rejecting "any such terms," and saying:

"If Mrs. Rivers, or you representing Mrs. Rivers, would like me to sell it, I can do it at the board rate here—the same as any other broker would do, on a three per cent. commission and get you what the property is worth and no more—and in doing this I would not divide my commission with any one."

In reply Gleason deprecated any implied sinister reflection on his proposal, explaining its intendment as he viewed it and stating Mrs. Rivers' selling price up to August 1st was $15,000 net. Gleason testified that Woolley subsequently inquired by telephone if defendant would take $12,000 for the property and later $12,500, which were refused. After this there appears to have been certain communications between them, the details of which are not made clear, resulting in something of an adjustment of previous views as to commissions and prices, for Woolley sent a letter to Gleason on January 14, 1915, inclosing $100 and this

contract, prepared in duplicate for defendant's execution, by which the broker's commission was taken out of her previous net price. Of this Woolley stated in his letter:

"I have filled in this contract. The commission as stated over the 'phone, with understanding you are to have half of it, I did not fill in because for fear it might get into hands that should not know this. It is between you and me and you can take my word for it that you shall have one-half."

In returning the signed contract to Woolley her attorney stated, "Your letter as to matter of commission is sufficient." Correspondence followed as to the kind of abstract to be furnished and its cost, after which the attorneys to whom the abstract was submitted raised certain technical objections, which were discussed in correspondence, and during the delay Gleason received information, as he testified, "that the price we had agreed to sell this property for was about half its value," and he then went over to Detroit to investigate. Shortly thereafter, within 60 days from the date of the contract, and before notified in writing by Woolley that "we are now ready to accept deed and title" of the property, he, with defendant's authority, served notice of rescission of the contract and tendered back the $100 she had received.

Upon the market value of the property when this contract was signed, defendant called seven witnesses who qualified to a greater or less degree as experts on real estate values in Detroit, and testified to familiar knowledge of sales and prices in that locality. Two of plaintiff's witnesses testified upon the subject. As to that issue of fact we find no occasion to disagree with the finding of the trial court that the weight of evidence fairly shows "the property in question at the time this contract was made was worth from twenty-two to twenty-five thousand dollars, which defendants did not know. * * *"

Woolley unfortunately died before this case was heard and it is earnestly urged that Gleason's testimony as to statements made to him by Woolley is inadmissible; but eliminating them from consideration the conclusion is unavoidable from the undisputed facts and written evidence that with his shown 18 years' experience in the real estate business in Detroit, handling this property for years as agent, executor and broker, he well knew its actual market value and future prospects of enhancement. His sworn report to the probate court in February, 1914, of which defendant and her attorney were ignorant, indicates his knowledge and views. He at that time estimated approximately a 40% increase in value over the probate appraisal of the East Adams avenue property belonging to the estate, which he truthfully states is located "in a district where values have largely increased of late." 48 Adams avenue east lies closest to Grand Circus Park, near to which experts testify to greatest appreciation in values. He not only refrained from imparting this information to defendant and her attorney, but in his communications with them asserted the value and endeavored to secure a price below the appraisal.

In reviewing this contention it cannot be overlooked that Woolley was, during these events, executor of the estate, in charge of this property as one of its assets, collecting the rents from the beginning until it was sold by him as agent and broker of defendant, as shown by his written statement. As executor of the estate and custodian of its assets during probation he held trust relations with defendant demanding utmost good faith. *Parks* v. *Brooks,* 188 Mich. 657.

"The executors or administrators occupy a position of technical trust. * * * They are not absolutely prohibited from dealing with legatees or beneficiaries in respect to the interest of the latter in the estate.

But if they do they must meet and overcome the presumption of fraud which the law raises against them. That is, they must show the entire fairness of the transaction, and will not be allowed to retain any advantage they may have gained if there is evidence of any misrepresentation, concealment or deceit, or evidence of any advantage taken of inexperience, ignorance or trustfulness of the other party." 1 Black on Rescission and Cancellation, § 48.

In his capacity as agent or broker the rule is well settled that it was his duty to act towards defendant in entire good faith and he was—

"bound to disclose to his principal all facts within his knowledge which are or may be material to the matter in which he is employed, or which might influence the principal in his action; * * *, and the principle is applicable wherever the broker has an interest of any kind in the transaction antagonistic to that of his employer or where he is so situated as to be subject to temptation to act adversely to his employer." *Veasey* v. *Carson*, 177 Mass. 117 (53 L. R. A. 241, 58 N. E. 177).

"Loyalty to his principal's interests also requires that an agent should make known to his principal every material fact concerning the subject-matter of his agency that comes to his knowledge or is in his memory in the course of his agency." 31 Cyc. p. 1450, and cases cited.

The contention that defendant was represented by her attorney who in effect fixed the price and was presumed to protect her interests does not affect the controlling question here. He as attorney for her was not dealing at arm's length with her broker any more than she would have been. The fact that the broker dealt with her through an attorney presumably more competent than she would be did not excuse the broker from his duty to his principal, nor would lack of diligence on the part of her attorney to verify his representations or discover imposition or fraudulent conduct of the broker, whether active or passive, excuse

the latter. *Smith* v. *Werkheiser*, 152 Mich. 177 (15 L. R. A. [N. S.] 1092).

Gleason did know that Woolley was trying to sell this property to or purchase it for Hannan, by whom he was employed or with whom he was associated, at a price which was refused. His role there was a difficult one, but with knowledge and consent of buyer and seller he could lawfully be agent for both. Those efforts failed. That defendant had no knowledge of a double agency at the time of the contract is well established. Neither Gleason or defendant knew that Woolley was in any sense agent for McCulley when he produced him as a purchaser, nor of any employment or interests in common between them, or that they were both connected with the Hannan Exchange in familiar association, having desk room in the same suite of offices.

It is denied by plaintiff that Woolley was his agent in the transaction in any sense beyond looking after the conveyancing to him in closing the deal, as is customary for brokers to do for purchasers. In plaintiff's answer to defendant's cross-bill he—

"admits on information and belief that it was agreed between said defendant, through her attorney, and said Woolley representing complainant that when complainant was ready for a deed he would cause the same to be prepared and sent to defendant for execution. * * * He denies that said Woolley attempted to purchase said property while acting as executor of the estate mentioned in said answer by way of cross-bill or as agent for the defendant, but says that he expressly informed the attorney for said defendant that he was in no way representing said estate or said defendant.

"He denies that said property is worth more than fifteen thousand ($15,000) dollars, but says that fifteen thousand ($15,000) dollars is the full value of the same and all it is worth. He further shows on information and belief that said defendant was not led to believe and also could not have believed that said

Woolley was acting for her in selling said property in any way."

Asked about this on cross-examination, although asserting he dealt with him as the agent of defendant, he replied, "Yes, Mr. Woolley represented me because there was nobody else to represent me." While expressing the opinion that he agreed to pay all the property was worth, he said, "I am no expert on real estate values, however"; he also stated during his examination, "Woolley was the only person I ever consulted about this proposition."

The unquestionably admissible, and for the most part written and undisputed, evidence in this case naturally adjusts itself to, and we think conclusively shows, a double agency in which the agent without the full knowledge or consent of the seller, his primary principal, also represented the buyer to the former's disadvantage. A contract so negotiated by the agent is voidable at the option of the seller, or principal by whom the agent was originally employed. "A broker cannot act as the agent of both parties where their interests are conflicting." 4 Am. & Eng. Enc. Law (2d Ed.), p. 966. *Vide*, also, 1 Am. & Eng. Enc. Law (2d Ed.), p. 1073, and 31 Cyc. p. 1572. In *Greenwood* v. *Spring*, 54 Barb. (N. Y.) 375, involving a double agency of this type, the court said that where application is made within reasonable time—

"It is not necessary for a party seeking to avoid a contract on this ground (undisclosed double agency) to show that any improper advantage has been gained over him; he may repudiate or affirm the contract irrespective of any proof of actual fraud."

The general rule was early recognized in this State. In *Moore* v. *Mandlebaum*, 8 Mich. 442, it is said of an agent for the seller:

"In that confidential relation he was bound to the utmost good faith, and had no right, while professing

to act in that capacity, to make himself the agent of other parties for the purchase of the lands he was authorized by plaintiff to sell; nor to take advantage of the confidence his position inspired to obtain the title for himself. Nor could he make a valid purchase from his principal, while that confidential relation existed, without fully and fairly disclosing to his principal * * * all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of such sale."

The contract was voidable at the option of the seller.

The decree of the trial court is affirmed, with costs to defendant.

OSTRANDER, C. J., and BIRD, MOORE, FELLOWS, STONE, and KUHN, JJ., concurred. BROOKE, J., did not sit.

McDONALD v. HALL.

1. CONSPIRACY—EVIDENCE—CONCERT OF ACTION.
   In an action for conspiracy and malicious arrest, testimony concerning the doings and sayings of certain participants which, separately considered, might seem objectionable, on the whole record is made admissible by inferential proof of concert of action in a common purpose; if in the end concert of action is apparent, such testimony is admissible.

2. SAME.
   Every person entering into a conspiracy already formed is deemed to be a party to all acts done in furtherance of the common design; and acts and declarations of co-conspirators done at different times and by different individuals are admissible in evidence against all, since whatever is said or done by any one of the number in furtherance of the common design, becomes a part of the *res gestæ*, and is the act or saying of all.

3. TRIAL—PLEADING—ISSUE.

Where a charge in the declaration that one of the defendants debauched the infant daughter of plaintiff was stated by way of inducement to the principal subject of the count, which alleged a "conspiracy of all the defendants to wrong the plaintiff by falsely charging him" with compounding a felony, a case of debauchery was not in issue, and it was reversible error for plaintiff's counsel, throughout the trial, against objections of defendants' counsel, to persistently inject the issue of the debauchery, although the question of debauchery was not submitted to the jury as a ground of recovery.

4. SAME—ARGUMENT OF COUNSEL.

In such action for conspiracy, it was reversible error for plaintiff's counsel, in his closing argument to the jury, to appeal to the passions and prejudices of the jurors on the subject of the debauchery of plaintiff's infant daughter, which was not in issue in the case.

Error to Shiawassee; Searl, J., presiding. Submitted April 5, 1918. (Docket No. 35.) Decided December 27, 1918.

Case by Hugh A. McDonald against Louis C. Hall, Sr., and others for conspiracy and malicious arrest. Judgment for plaintiff against defendant Hall, Sr., who brings error. Reversed.

John T. McCurdy (*Edwin H. Lyon*, of counsel), for appellant.

Albert L. Chandler and *James H. Pound*, for appellee.

STEERE, J. This case was formerly here on certiorari to an order of the trial court overruling defendants' demurrer to plaintiff's declaration, which was sustained, 193 Mich. 50. That opinion incidentally discloses the nature of this litigation and in discussing certain peculiarities of the declaration is somewhat premonitory of the difficulties and differences which

developed under it upon trial of the case. At that early stage of the proceedings the court noted "there was much controversy and disagreement as to the number of counts in the declaration, which is a very lengthy document, covering about 30 pages of the printed record."

Although it was possible to discover by careful analysis of the "lengthy document" and point out what could be recognized as four separate counts, the "much controversy and disagreement" over that pleading has continued unabated. The four counts as this court found were, *first*, that the portion of the declaration "charging all of the defendants with an assault and battery upon the person of G. Irene McDonald, the infant daughter of plaintiff, must be held to constitute one count." A charge that Louis C. Hall, Jr., debauched the infant daughter of plaintiff was held to be only introductory matter stated by way of inducement to the principal subject of the next count which alleged a "conspiracy of all the defendants to wrong the plaintiff by falsely charging him with a crime in the manner alleged." The third count was found to be "a distinct charge against all of the defendants for an assault and battery upon the plaintiff and for resulting damages." And the fourth count "is for the malicious prosecution of the plaintiff by all of the defendants acting together in and through the defendant Louis C. Hall, Sr."

Following that opinion defendants pleaded the general issue with 29 notices of special defense apparently designed to approximate the declaration in magnitude, if not in multitude of words. The trial resulted in a verdict and judgment against defendant Louis C. Hall, Sr., under the conspiracy count, for $3,400, the other defendants being found not guilty by direction of the court. A motion for a new trial on many of

the grounds repeated here was denied, and defendant Hall, Sr., has removed the judgment to this court for review on 204 assignments of error, many of which in different form center to the same legal objections.

All the parties to this action lived in Owosso. Plaintiff, Hugh McDonald, was foreman in an ice cream factory, of which his brother John was manager, where his duties confined him during regular working hours. He had four children, one of whom was a girl called Irene, then living at home and attending school. On January 8, 1915, she and a school mate named Ruth Preston went to a dance in the Moose hall between two and three blocks from her home. By previous arrangement these girls were followed after they left the dance about midnight and picked up on the street by defendant Louis C. Hall, Jr., a young man 20 years of age, and an associate named Reddy Smith, who took them to the home of Hall, Jr.'s, father, defendant Louis C. Hall, Sr., who with his wife was then absent from home, where the four remained for some time during which it was charged young Hall had sexual relations with the girl Irene. Some days later plaintiff had occasion to take his daughter to a physician for medical treatment and from what he then learned laid the matter before the proper officials and made complaint before a magistrate against young Hall for statutory rape upon his daughter. The prosecuting attorney took charge of the case for the people and after investigation consistently maintained it as a criminal charge of felony which he as public prosecutor ought to and did prosecute to final trial and adjudication in the circuit court, where young Hall was eventually acquitted, as plaintiff claims largely through the pretrial conspiring efforts of defendants and others who worked with them to that end; it being also charged in his declaration that under the conditions detailed he was deceived into agreeing to a settle-

ment of the case through the misrepresentations and false statements made to him as to his right to do so by an attorney named John T. McCurdy and the Rev. C. H. Hanks, two members of the learned professions who figured conspicuously, at least, in certain of the events charged to constitute the conspiracy. Defendant Hall, Sr., was a business man in that city, where he ran an elevator and grain business, was a stockholder and director in the State Savings Bank of Owosso, called the Gallagher Bank, of which defendant Gallagher was president, and a paying member of the church of which the Rev. Hanks was pastor. Shortly after the matter became public Mr. Hanks went to the factory where plaintiff worked and admittedly talked the matter over with him, counseling a settlement of the matter as plaintiff claims and he denies, stating that he only "was trying to save the young people," but admitting, however, that in so doing he "may have referred to a double standard." He also interviewed the prosecuting attorney in company with the brother of Hall, Sr., and while there telephoned for Hall, Sr., and son to come there, the purpose of the interview being, as they stated it in a general way to the prosecuting attorney, to see if a prosecution could be avoided. Later, when McCurdy arrived from the south he introduced him to plaintiff and was present at an interview in the back room of Gallagher's bank between the Halls, McCurdy, plaintiff and his brother. Just how the parties came to meet there, and what was said or promised is in marked dispute, but Mr. Hanks, while not prepared to go into details, gave his recollection in reply to an inquiry as to the manner in which the case was to be handled, or disposed of, "that it would have to rest entirely with the father, representing the girl, whether this complaint was urged or not, it rested with him to say."

When called into the case McCurdy was making

his home at the Traverse Club in San Antonio, Texas, and was telegraphed for by Hall, Sr. He testified that he started at once on receipt of the telegram, arriving at Shiawassee county on March 2d, going that afternoon at the request of one of the Halls to the bank parlors where they found the McDonald brothers and Mr. Hanks, who introduced him to the McDonalds, and the matter in relation to which he had been retained was discussed. Plaintiff testified, and we do not discover it denied, that he was called to this interview by the brother of Hall, Sr. What was proposed and said there is in marked dispute. Plaintiff claims that he had been urged by Hall, Sr., and Mr. Hanks to settle the matter up and drop the prosecution, that he was assured by McCurdy that rather than try the unwholesome case he desired to effect this in the interest of all parties; that he was an attorney of long experience and ability who would not think of countenancing anything but what was proper and lawful, and they could depend on his professional advice that such course was right, permissible and in the interest of all concerned; that plaintiff believed what they told him, listened to their overtures and entered into negotiations for a settlement.

Not claiming that any of them ever suggested to plaintiff that such course was unlawful and criminal, it was contended and testified for defendants that all overtures for settlement and demand for a money adjustment emanated from plaintiff and his proposals were tentatively entertained for the purpose of seeing how far he would go in compounding a felony.

Thereafter McCurdy figured actively in the case in the three-fold capacity of detective, witness and attorney, actively participating at the trial in the two last named. He had several friendly interviews with plaintiff, upon whose initiative they do not agree, one of which was at his own house which Hall, Sr., and the

cashier of the bank attended, in hiding, and overheard. He secured before he got through the signature of plaintiff to three agreements, or an agreement in triplicate as he calls it, to settle and withdraw the criminal case against young Hall for $5,000, making arrangements to meet him in the bank at an appointed hour and consummate the agreement. Hall, Sr., who was listening in at the time, testified he heard McCurdy assure plaintiff, who had expressed some misgivings, that it would "go through as scheduled," although on reflection he denied knowing what the schedule was or what the word meant.

As agreed, McCurdy, plaintiff, and Hall, Sr., met in the back room of Gallagher's bank after 3 o'clock the next afternoon, the other parties visibly in attendance being Gallagher and an assistant in the bank named Stanton. Gallagher had, at McCurdy's request, previously done up $5,000 in packages, taking the numbers of the bills which he stated was a task taking some little time. They then proceeded as plaintiff supposed to close the deal, with McCurdy as the moving party in charge. They sat at a table and, as McCurdy testified, he told plaintiff, "I have prepared a triplicate set of your offer in regard to this matter," which he read and plaintiff signed, Gallagher and Stanton signing as witnesses. He then told Gallagher to bring in the money, which he did and laid it upon the table. Plaintiff testified Hall, Sr., then handed it to him. After starting to count it he made some inquiry of Gallagher as to the amount in each package. After assurance by him as to the amount he asked Gallagher to put it in the bank and give him a certificate for it, to which McCurdy answered for Gallagher that he "did not wish that money in the bank," and plaintiff then proceeded to put it in his pocket, when McCurdy in a loud voice summoned defendant Herrick, a deputy sheriff stationed outside the room in

sequestered attendance, to come in and arrest plaintiff for compounding a felony and ordered plaintiff to put the money back on the table with which he complied. Plaintiff then proposed to telephone his brother or get counsel, but McCurdy told him he could not telephone or communicate with any one and directed Herrick to take charge of the money and arrest him, which he did. Herrick testified that his presence there was pursuant to an earlier request from McCurdy to be available at the hotel nearby to serve some papers and he was called from there to the bank by Stanton. McCurdy then telephoned for the prosecuting attorney and laid the matter before him, stating what had transpired was the result of plaintiff's solicitation and asked that on such evidence as he presented a warrant be authorized against plaintiff, to which the prosecutor assented, complaint being made by Hall, Sr., under a section of the statute McCurdy said he had looked up, and made reference to. The sheriff was authorized to put the money back in the bank, taking a certificate of deposit. Plaintiff employed counsel to defend him and obtained bail after which his case was continued from time to time, being eventually dismissed on advice of the prosecuting attorney that under the section of the statute McCurdy had selected and the complaint as made he could not be held.

Of the many assignments of error on admission against objection of testimony introduced by plaintiff to support the charge of conspiracy, it is sufficient to state that most of them are directed to items of testimony concerning the doings and sayings of certain participants which separately considered might seem objectionable, but on the whole record are made admissible by inferential proof of concerted action in a common purpose.

"Evidence in proof of a conspiracy is generally cir-

cumstantial and it will be sufficient if it proves the fact that the agreement to do the unlawful act existed, although its terms, the time and place of forming may not be shown." 3 Enc. Ev. p. 408.

It is not essential that all parties claimed to be participants in a conspiracy be made parties to the action, and when it is inferable from what they said and did that they were working to the same purpose, with the same object in view, so that in the end concert of action is apparent, such testimony is admissible. It may be said in general that most, if not all, objections of that character are not tenable under the recognized rules of evidence applicable to such an inquiry, well stated in Wright on Conspiracies, p. 212, in part as follows:

"In nearly all cases a conspiracy must be proved by circumstantial evidence, that is, by the proof of facts from which it may be fairly implied that the defendants had a common object, and that the acts of each, though they may be different in character, were all done in pursuance of a common end and calculated to effect the common purpose. * * * Concurrence of action on a material point is sufficient to enable the jury to presume concurrence of sentiment, and from this the actual fact of conspiracy may be inferred. Nor is it necessary to show that the conspiracy originated with the defendants, for every person entering into a conspiracy already formed is deemed to be a party to all acts done by any of the other parties, before or afterwards, if done in furtherance of the common design. It is upon this principle of a common design that the acts and declarations of co-conspirators, and acts done at different times and by different individuals are admitted in evidence against those prosecuted, as whatever is said or done by any one of the number, in furtherance of the common design becomes a part of the *res gestæ*, and is the act or saying of all."

The far more serious assignments of error are those which in various forms are directed to the persistent

and questionable manner in which throughout the trial plaintiff's counsel stressed, against all objections of counsel, intimations and rulings of the court, the issue of the debauchery, claiming speciously the right under allegations upon that subject in their voluminous declaration, asserted to have been sustained and approved by this court.

They did not have and could not try, under their declaration, a case of debauchery against young Hall, much less the other defendants, and yet all through the case that offense was emotionally made the dominant subject of their efforts, either under the guise of inducement to their conspiracy count or the claim of right under "all four counts of the declaration," which were laid against all defendants. Objection was early and often made by defendants to such endeavor.

On the former appeal the only question before this court was one of pleading. In holding that as a pleading the declaration sufficiently charged the acts complained of in the four counts as the joint acts of all the defendants the court could not and did not assume to pass upon what might develop upon the trial, and particularly stated in view of questions it was claimed the peculiarities of the declaration foreshadowed, "what the evidence may show we are not here concerned with."

What the evidence did show on the trial was that this case arose out of the criminal prosecution of Hall, Jr., for statutory rape of plaintiff's daughter, a child 13 years of age; that the only suggested grievance of plaintiff against the other defendants was a claimed conspiracy entered into by them after commission of the charged crime, and while the criminal prosecution was pending, to defeat his conviction by deceiving and ensnaring plaintiff into unwittingly compounding the felony by accepting money for settling the case and agreeing to withdraw his complaint,

under the belief from their assurances that it was right and lawful for him to do so, with no proof or pretense that they participated in or were in any way parties to any assault upon the young girl, felonious or otherwise, or even ever heard of the alleged assault until it was made public by the criminal proceeding against young Hall.

Early in the trial when objection was made to certain of plaintiff's testimony the court, after some discussion of the declaration, suggested it should be determined what it was proposed to try, whether a charge of debauchery or conspiracy or both, and was informed by the counsel who drew the declaration that the charge of debauchery was "only alleged by way of inducement, and not as a count and therefore that part of it is not proven as a count for damages. * * * That debauching the plaintiff's daughter is a cause that we have, and that it was an inducement to the conspiracy charge these people went into." Asked if they intended to ask for damages under the count for assault and battery he answered, "Not specifically against Louis C. Hall." But later, when the associate counsel for plaintiff most aggressively in charge of that side of the case proceeded against objection along lines indicting a different theory and a discussion arose, he stated,

"I tell your honor that the plaintiff in this case claims for four counts—an action for malicious prosecution, false imprisonment, assault and battery, and the injury to the child under the assault and battery clause and aggravation of it.

"*The Court:* You claim under all four counts of the declaration?

"*Mr. P.:* All four counts of the declaration."

Apparently upon this theory and as an affirmative part of his case counsel continued, against numerous objections and requests that he be required to elect

between counts, with proof of debauchery as a substantive cause of action, introducing the testimony of young Hall taken upon his trial in the criminal case, and calling among other witnesses the girl claimed to have been debauched to describe the offense in detail. Afterwards, when a question of damages arose and the court asked him if they claimed "damages for intercourse with this girl," and said that question should be settled, he declared his reason for refusing to elect as follows:

"Now, all through that declaration our great grievance is just two things as I understand, the wrong to the girl, to this man in his capacity of father, the wrong to himself in the arrest. We have a right to show these things and couple them in one declaration. The doctrine of election never applies until the testimony on any theory possible has been submitted to the court."

And later, when it was intimated by the court that counsel should state upon what different counts they expected to go to the jury, he again answered:

"I insist we are entitled to go to the jury as matter of law and for them to determine every count set forth in the declaration.

"*The Court:* All four counts?

"*Mr. P.:* All four counts."

While the court did not ultimately submit the question of debauchery to the jury as a ground of recovery, the matter was left open for counsel to ring the changes upon it until final argument of the case to the jury, in which impassioned and prejudicial appeal was made pointing to debauchery as a ground of recovery and the controlling issue for the jury to decide, counsel's peroration being, against objection and exception, in part as follows:

"Gentlemen of the jury: Now, as we approach this glad festival time now coming, Thanksgiving (which is peculiarly an American product for the giving of

thanks for the blessings that have been showered upon us by Divine Providence), as you return to your wife to eat your Thanksgiving dinner I hope you will so conduct yourselves in this case by the rendition of a verdict that will get the respect of the community, that will show that girls and women are not beasts to be handled as mere toys of men, and I hope that you will be able to say, gentlemen of the jury, as you go to your home and meet your wife and press your lips upon her mouth or forehead, 'Nellie, I have been trying cases in the circuit court here during this term. So far I have had but one opportunity to undertake to protect those that need protection, the children; I have had only one opportunity to emulate the Divine example of the Savior of mankind when he said, "Suffer little children to come unto me and forbid them not for of such is the kingdom of heaven." I say to you, the girl that I loved since you have been 18 or 19 years of age up to the present time (and as years go by I love you even more dearly than I have before), by the verdict I have written upon the records of Shiawassee county, I have shown that while there is no price to be fixed on any women, that the clouds are the limit as to the total damage for the desecrating and ruining of a child before she comes to the age of discretion by an habitual destroyer of women—not women, but of children.' "

The inducement of a pleading is but an explanatory introduction to the main allegation in which the cause of action is alleged. Although counsel insisted to the contrary, the court had held when this argument was made that there could be no recovery against young Hall in this case, but whatever right of action plaintiff had against him for debauching his daughter remained and could be pursued in a proper case. It seems patent that counsel knew from the beginning, as the court from the pleadings did not, that there was no ground for the count charging Hall, Jr., and the other defendants jointly with an assault on plaintiff's daughter, and it is indicated by this record that counsel was, at least, not frank with the court in in-

sisting they should not be required to elect as to counts "until the testimony on any theory possible has been submitted to the court"; for had their position been timely made clear, the court could and undoubtedly would have excluded certain of plaintiff's evidence and argument featuring the assault and debauchery as the dominant issue when affirmatively proving their case.

After the case had been tried and the record made all these matters were presented to the court in a motion for a new trial with numerous other grounds which need not be discussed. It was especially urged amongst other reasons that defendant was injured and prejudiced in the closing argument of plaintiff's counsel by appeals to the passions and prejudice of the jurors on the subject of young Hall's alleged debauching as above quoted in part, and failure of the court when objection was made to then check and correct counsel.

We think that for these prejudicial errors defendant should be granted a new trial.

The judgment is reversed, with costs to defendant, and a new trial granted.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WINE v. NEWCOMB, ENDICOTT & CO.

1. NEGLIGENCE — PERSONAL INJURIES — EVIDENCE — QUESTION FOR JURY.

   In an action for personal injuries caused by a fall, testimony by plaintiff that while she was shopping with her daughter in defendant's store, and while passing down an aisle plaintiff fell and was injured, and testimony by the daughter that she noticed her foot was in contact with a rope or cord on the floor, that she turned to warn her mother just as the latter fell, and that a loop or coil of the rope was about the foot or ankle of the mother, raised a question for the jury as to what brought about plaintiff's fall. KUHN, BROOKE, and FELLOWS, JJ., dissenting.

2. SAME—TRIAL—INSTRUCTIONS.

   It was error for the trial court to neglect to submit to the jury the question as to whether plaintiff tripped on the rope or cord, as controlling of the question of defendant's negligence, as requested by plaintiff's counsel. KUHN, BROOKE, and FELLOWS, JJ., dissenting.

3. SAME—CONTRIBUTORY NEGLIGENCE—TRIAL—INSTRUCTIONS.

   In the absence of testimony that plaintiff was acting any differently from ordinary people in going about the store, an instruction by the trial court that "one who enters a busy store must keep his wits about him; he must pay attention to his surroundings, and he cannot go hither and thither absent-minded, thinking of some particular subject and shutting his eyes to everything else; * * * such inattention is a want of that ordinary care which the safety of society requires of sane persons of mature age to exercise," was erroneous.

4. SAME—CONTRIBUTORY NEGLIGENCE—SAFE PLACE.

   As a general proposition, a customer in a store has the right to rely upon the safety of passage along passageways used by customers.

5. SAME—OBSTRUCTIONS.

   A customer in a store is not bound to anticipate that there would be any obstruction on the floor, such as a coil of rope or cord.

See notes in 21 L. R. A. (N. S.) 456; L. R. A. 1915F, 572.

6. SAME—EVIDENCE—IDENTITY OF DEFENDANT.

Where the record showed that a corporation named as defendant was organized to carry on the business of selling dry goods at retail in Detroit, testimony that plaintiff was shopping in the store of this corporation when she was injured, *held*, sufficient to show that the store in which plaintiff was injured was owned and operated by defendant.

7. EVIDENCE—JUDICIAL NOTICE.

The court will not take judicial notice of the fact that many large stores apparently owned and operated by one company have departments operated and controlled by entirely separate corporations.

8. SAME—MASTER AND SERVANT—INFERENCES—NEGLIGENCE.

Testimony that an apparent employee of defendant was engaged in taking down some decorations in defendant's store, and had in his hand one end of the rope or cord over which plaintiff, a customer, tripped and was injured, was sufficient to warrant the inference that said person was an employee of defendant.

Error to Wayne; Des Voignes, J., presiding. Submitted June 12, 1918. (Docket Nos. 4, 5.) Decided December 27, 1918.

Case by Meyer Wine against Newcomb, Endicott & Company for personal injuries to plaintiff's wife. Case by Leah Wine against Newcomb, Endicott & Company for personal injuries. The causes were heard as one. Judgment for defendant. Plaintiffs bring error. Reversed.

Selling & Brand, for appellants.

Keena, Lightner, Oxtoby & Hanley, for appellee.

OSTRANDER, C. J. Testimony for plaintiff (none was offered by defendant except that of a medical man, called, for convenience, out of order) tended to prove that on January 4, 1915, while Leah Wine and her daughter were shopping in defendant's store and

were passing along an aisle, or space, set with tables displaying goods, the mother, Leah, fell to the floor, sustaining severe physical injury. The mother, a witness in her own behalf, does not state what caused her to fall, and nothing in her testimony tends to prove negligence of defendant. The daughter accompanying her testified, in substance and effect, that just before her mother fell she noticed that her own foot was in contact with a rope or cord on the floor and that she had turned to call her mother's attention to it just as she fell. She saw, she said, a man, apparently an employee, removing holiday decorations, who was handling a rope or cord, some of which was upon the floor and coiled, or in loops, one end or length of which he held and one loop or coil of which was about the foot or ankle of her mother after she had fallen. It slipped off when she was assisted from the floor. The person who was handling the rope or cord and another helped Leah, took her to the next room, and one of them sent for a physician.

When plaintiff's case was concluded, defendant moved for a directed verdict in its favor and, the motion being denied, rested. The case was submitted to a jury, and a verdict for defendant was returned. A motion for a new trial was refused.

Meyer Wine is husband of Leah Wine. He also began a suit against the defendant for damages for the injury resulting to him on account of the facts stated and the sums disbursed by him in curing his wife. The causes were heard together, submitted to the same jury, with the same result.

For Leah Wine it is assigned as error (1) that the court refused a new trial, (2) that the court submitted to the jury whether plaintiff was guilty of contributory negligence, (3) that certain of plaintiff's requests to charge were refused, (4) that the court wrongly instructed the jury, (5) that counsel for de-

fendant made improper argument to the jury which, when challenged, was allowed to go unrebuked.

In denying the motion for a new trial, after discussing and overruling the various grounds assigned therefor, the court said:

"I am constrained to say that in any event there is no necessity for reviewing these several assignments of error, because I am now convinced that under the evidence produced in this case the court at the conclusion of plaintiff's case should have granted defendant's motion for a directed verdict."

The reasons for this conclusion are not stated beyond this, that in the same opinion it is recited that

"defendant moved for a directed verdict on the ground that under the evidence plaintiff had shown no act amounting to actionable negligence on the part of defendant."

And it is further stated in the opinion:

"On the argument to the jury defendant's counsel contended that from the cross-examination of Mrs. Wine it developed that it was just as probable to conclude that she tripped by stepping on the skirt of her dress as upon the coil of cord or rope. Mrs. Wine admitted that she wore on the day of the accident a long dress skirt, and the jury could see the one she was then wearing; also that she was uncertain on her feet, very stout and heavy in physique."

The appearance of Leah Wine and the length of the dress she wore may have impressed the jury favorably to the idea that it was at least uncertain whether the rope or twine was the cause of her fall. The testimony of her daughter, the only testimony pointing to defendant's negligence, when read with that of the mother, whatever the appearance of the mother, raised a question of fact for the jury as to what brought about her fall. The daughter did not see her mother fall. The mother, as has been stated, does not account for the fall. The cord or rope is the only cause for

the fall asserted by the plaintiffs. If this question was properly submitted, plaintiffs must be contented with the verdict.

The assignments of error are in each case the same. Upon the subject of defendant's alleged negligence the court advised the jury:

"The question is, Was this injury caused or produced, and does she suffer by reason of the negligence on the part of the defendant here, and should the defendant, by reason of such negligence, be required to respond in damages?

"In considering this question, gentlemen, as to negligence, a customer entering the store of a retail merchant by invitation has a right to believe that there are no concealed sources of danger and is not required to be on the look-out for the unusual thing. Is it a usual or unusual circumstance for a mercantile concern whose store is open for business, to have in its aisle a rope or cord? Was it in this instance so placed that a customer might reasonably be expected to stumble? Had Mrs. Wine no reason to suspect that such a condition ought to have existed, or is she chargeable with negligence in not anticipating such a circumstance?

"Where a mercantile establishment, by its advertising or otherwise, as I have stated, invites people to go upon its premises to inspect goods, does it assume to all who accept the invitation, the duty to warn them of any danger in coming, which is known to the employees of the mercantile establishment, or ought to be known of by them. Note the language of that, gentlemen, when you come to analyze the question of liability here; that is, was the danger known to the employees of the mercantile establishment, should they have known it, or was it by reason of the circumstances of the case unknown to him?

"Mrs. Wine was not charged with the duty of anticipating that there would be lying across the aisle of the defendant's floor any such obstruction as the one over which she tripped, or claimed to have tripped. Now, gentlemen, in analyzing this proposition as to whether or not there was negligence on the part of

the defendant, you should inquire of the testimony and determine among other things, was this cord found wrapped about the leg or foot of Mrs. Wine when she fell? Inquire from the testimony and determine whether, from the facts as they are adduced here, whether the fall was occasioned by the cord so wrapped about her foot. Inquire of the evidence and determine what, if anything, is shown as to whether one end of the cord was in the hands of the defendant's employee at the time. If it was, whether anything at that time done by the employee of the defendant had a tendency to increase the danger or hazard. In fact, gentlemen, analyze all this testimony.

"It is the claim of the plaintiff in this case that this cord was of a material that permitted a loop as it lay on the floor, to stand up, and that by reason of that, in walking along she put her foot in that cord, and that there was quite a quantity of the rope or cord upon the floor, and that by reason of this entanglement it threw her down. Upon the other hand, gentlemen, the defendant contends that the dress of Leah Wine being rather long, that it is just as well to find that she was in the act of leaning over in examining the goods upon the table, that her dress being perhaps to some extent upon the floor, she stepped upon it, tripped, and that occasioned the fall. In other words, gentlemen, analyze the evidence in the case and determine, if you can, whether or not this cord occasioned the fall. You will have to be satisfied by a preponderance of the evidence that her fall was occasioned by this cord. You cannot find the defendant in this case liable unless you determine the proximate cause of her falling was due to the fact of this entanglement of her foot in this rope or wire, cord.

"If you find the defendant was not negligent you need consider this case no further but return to this court with a verdict of no cause of action.

"If, upon the other hand, you find that the defendant was negligent, then you will pass to the next proposition: Was the plaintiff guilty of contributory negligence?"

If any rule for determining defendant's negligence was given, it must be found in the foregoing. I feel

compelled to say that no rule is stated. It is patent that the fact that plaintiff tripped on the rope or cord, while it was a necessary fact to be found, was not made controlling or conclusive of defendant's negligence. While plaintiff's requests to charge upon this subject are somewhat discursive, they ask for a rule, and in substance for a proper rule, for determining defendant's negligence.

Upon the subject of the duty of the plaintiff the jury was told:

"One who enters a busy store must keep his wits about him and pay attention. He must pay attention to his surroundings, and he cannot go hither and thither absent-minded and thinking of some particular subject, and, shutting his eyes to everything else. Such inattention is sometimes dangerous to the person himself, and quite as often to his neighbors. Such inattention is a want of that ordinary care which the safety of society requires of sane persons of mature age to exercise, and for which they are civilly responsible."

This was, in any event, an erroneous statement of the law as applied to the facts of this case. It does not appear that plaintiff was acting differently from ordinary people who visit establishments like that of defendant to examine merchandise—to shop. As a general proposition, a customer in such a place has the right to rely upon the safety of passage along passageways used by customers. *Brown* v. *Stevens*, 136 Mich. 311; *Bloomer* v. *Snellenburg*, 221 Pa. 25 (21 L. R. A. [N. S.] 464, 69 Atl. 1124). The court was requested to so instruct the jury. But there was no evidence of any negligence of plaintiff contributing to her injury. She did not see the rope, or cord, on the floor, and, as the court said to the jury, she was not bound to anticipate that there would be any such obstruction.

There are other assignments of error, not consid-

ered in view of the fact that the points raised are not likely to arise upon a new trial.

The appellee says that in any event the judgment was right and should not be reversed because (1) plaintiff did not introduce competent evidence that the store in which plaintiff was injured was owned and operated by defendant, (2) there was no proof that the young man who was taking down the decorations and had some of the cord in his hand was an employee or in any way subject to the control or supervision of defendant, (3) there was no proof as to the person who put, or allowed to be put, the cord in the aisle, whether it was the young man referred to, some customer in the store, or any other person, (4) there was no evidence that the cord had been in the aisle at all before the moment the daughter of plaintiff saw it, which was almost the instant of the accident, and, therefore, there is no evidence of notice to the defendant, (5) there was no proof as to what caused the cord to fall, whether through negligence of any one or by accident, (6) there was no competent evidence that the cord was what caused the plaintiff to fall. Excepting, perhaps, the last point stated, it does not appear that any of these questions was presented to or considered by the trial court. And none of them can upon this record be resolved in favor of defendant as a matter of law.

The defendant is charged as a corporation, and the plea is the general issue. The testimony is to the effect that plaintiff was injured in the place of business of the defendant. It is said this is not enough in view of the well known custom of which the court will take judicial notice that many large stores apparently owned and operated by one company have departments operated and controlled by entirely separate corporations, and plaintiff is bound to prove that the particular department in which she was injured

was owned and controlled by defendant. The court knows of no such custom as is referred to and doubts if there is in fact such a custom. The record shows there is a corporation named as defendant is named, organized to carry on the business of selling dry goods at retail in Detroit. The testimony is that plaintiff was in the store of this corporation when she was injured.

Some inferences may be drawn from the fact that one is employed in a place of business, apparently doing the work of an employee. And the case differs from *Toland* v. *Paine Furniture Co.*, 175 Mass. 476 (56 N. E. 608), where a customer fell over a mat on the floor, the mat being curled up, and from *De Velin* v. *Swanson* (R. I.), 72 Atl. 388, where a customer slipped on a banana peel on the floor. In the case at bar, there is evidence of the active agency of an apparent employee of defendant in making the passageway unsafe.

The other points are answered by what has already been said.

The judgment is reversed and a new trial granted, with costs to appellants as of a single appeal.

BIRD, MOORE, STEERE, and STONE, JJ., concurred with OSTRANDER, C. J.

KUHN, J. (*dissenting*). Accepting the proof offered in support of plaintiffs' case in the light most favorable to their contention, I am convinced that there was no evidence of any negligence on the part of the defendant to warrant the submission of the case to the jury. The testimony discloses that the young man had a piece of cord in his hand and was apparently taking down some Christmas decorations, and that he inadvertently dropped it in the aisle. There is no proof that it was in the aisle before the moment that it was discovered by Mrs. Blaustein, the daughter of

the plaintiff, who saw it when she felt it, according to her claim, against her foot, and that immediately thereafter, upon turning, she saw her mother fall to the floor. The evidence, therefore, as to the length of time that the cord was on the floor would clearly indicate that it was only a second or two from the time when the cord was first seen by any one to the time of the accident. There is no evidence that the defendant knew, or in the exercise of reasonable care ought to have known of the presence of the cord in the aisle, or that there was any negligence on its part in failing to remove it. Accepting the plaintiffs' theory of the case, in my opinion what occurred was simply an unavoidable accident, for which the defendant should not be held responsible. I am of the opinion that the learned judge might properly have directed a verdict for the defendant, as he intimates he should have in his denial of the motion for a new trial, and that there was no error in allowing the verdict of the jury to stand in finding that the plaintiff had no cause for action. I therefore cannot concur with the opinion of the Chief Justice.

The judgment should be affirmed.

BROOKE and FELLOWS, JJ., concurred with KUHN, J.

DALTON v. WEBER.

1. USURY—MORTGAGES—TAXES, PAYMENT BY MORTGAGOR—REDEMPTION.

   A mortgage executed by plaintiff and his wife bearing interest at 6 per cent., and providing in addition thereto that the mortgagors should pay all taxes and assessments levied upon the lands or upon or on account of the mortgage or the indebtedness secured thereby; and it appearing that the mortgagee paid taxes upon its personal estate at the rate of over 2 per cent., *held*, usurious. *Union Trust Co.* v. *Radford*, 176 Mich. 50.

2. SAME—BONUS.

   A mortgage calling for $10,000, while the amount actually paid to and received by the mortgagors was only $7,165.19, *held*, usurious.

3. SAME—ATTORNEY IN FACT—PRINCIPAL AND AGENT—INFERENCES.

   Where the loan was made by defendant's attorney in fact, and it is undisputed that the bonus claimed by plaintiffs was exacted, the court will not infer that the exaction was for the sole benefit of the agent, in the absence of evidence that the principal did not benefit by it.

4. SAME—EQUITY—INTEREST—FORFEITURES.

   On a bill by the mortgagors to redeem from foreclosure by advertisement of a usurious mortgage, equity will require them to pay the legal rate of interest, since to remit the interest would amount to forfeiture; the proceeding not being one by the usurious lender seeking to enforce usury.

5. PARTIES—MORTGAGES—FORECLOSURE—REDEMPTION—JURISDICTION—APPEAL AND ERROR.

   Where one of the defendants was a nominal holder only of a tax lease on the mortgaged premises for the benefit of the mortgagees, he was a proper party to a bill to redeem from the mortgage lien; but where he was not served with process, has had no opportunity to answer, and has not been heard, the court acquired no jurisdiction to adjudicate his rights, and the decree against him will be reversed although he did not in proper time claim an appeal.

Appeal from Wayne; Bridgman, J., presiding. Sub-

mitted June 4, 1918. (Docket No. 14.) Decided December 27, 1918.

Bill by Robert M. Dalton and another against Joseph F. Weber, Sarah A. Warner, Franklin E. Bushman and others to redeem from certain mortgage foreclosures. Defendant Warner filed a cross-bill asking affirmative relief. From the decree rendered, all parties appeal. Modified as to plaintiffs and defendants Weber. Affirmed as to defendant Warner. Reversed as to defendant Bushman.

Harrison Geer, for plaintiffs.

Wilkinson, Routier & Hinkley, for defendants Weber and Bushman.

Stellwagen & MacKay, for defendant Warner.

OSTRANDER, C. J. Plaintiffs, who are husband and wife, and who reside in Detroit, executed a mortgage upon real estate in the city of Detroit to the Detroit Fire & Marine Insurance Company to secure the payment of a note for $18,000, made by Robert M. Dalton to said mortgagee, with interest at the rate of six per cent. per annum. On the same day, which was January 21, 1911, they executed a second mortgage upon the same real estate to J. Cotter Weber, of Chicago, Illinois, as mortgagee, to secure the payment of a note, made by both of the plaintiffs, for $10,000 and interest at the rate of six per cent., payable quarterly. Each mortgage contains the covenant that the mortgagor, within 40 days after the same become due and payable, will pay all taxes and assessments levied upon the lands or upon or on account of the mortgage or the indebtedness secured thereby, whether levied against the mortgagor or otherwise. Interest was paid upon these mortgages until and to October 1, 1913. October 23, 1912, $1,500 was paid on the principal of the first

mortgage. November 14, 1913, the Detroit Fire & Marine Insurance Company assigned the first mortgage and note to J. Cotter Weber. The mortgagors having defaulted, both mortgages were foreclosed by advertisement. Upon the second mortgage, the property was bid in in the name of J. Cotter Weber, and the sheriff's deed, dated February 19, 1914, reciting that the property was sold on that day for the full amount of the mortgage, with interest, namely, $10,547, and that the deed would become absolute February 19, 1915. Upon the foreclosure of the first mortgage, the property was bid in in the name of J. Cotter Weber, and the sheriff's deed, dated July 28, 1914, recited that the bid was the full amount of the mortgage, $17,550.60, and that the same would become absolute July 28, 1915. Plaintiffs on March 23, 1915, filed their amended bill of complaint, in which Joseph F. Weber, Frank J. Weber, and Florence K. Weber, his wife, Thomas M. Weber, J. Cotter Weber and Sarah A. Warner are made defendants, the latter upon the charge that she is a subsequent incumbrancer of the premises, holding a mortgage thereon in the form of a deed executed to her by the plaintiffs as security for a loan. The relief prayed for is that the sheriff's sales and deeds in the said statutory foreclosure proceedings may be set aside and the premises redeemed from said liens; that an accounting may be had to ascertain the amount due upon the mortgages, and in that connection—

"your orators hereby offer to do equity and to pay, within such time as may be fixed by the court, the amount of principal and lawful interest which shall be determined by this court, on such accounting, to be due as aforesaid."

It is charged in the bill of complaint that the property in question is worth $60,000 and more, plaintiffs deriving rents therefrom amounting to more than $5,000 a year; that in 1910 it was sold upon a chancery

foreclosure of a mortgage, made to and held by the Detroit Fire & Marine Insurance Company, and that, no redemption having been made from that sale, the plaintiffs later secured a conveyance to themselves from the Detroit Fire & Marine Insurance Company of the premises for $24,676.19, which amount was paid by executing to said Detroit Fire & Marine Insurance Company the mortgage first hereinbefore described for $18,000 and $6,678.19 by the check of J. Cotter Weber. (The discrepancy of two dollars between the amount due to the insurance company and the amount paid it is understood to be the cost of recording the mortgage.) It is further charged that the amount of this check, plus a sum claimed to have been paid for taxes, was the actual consideration for the note and mortgage for $10,000 hereinbefore described. It is further charged that the said second mortgage and note were executed to J. Cotter Weber, of Chicago, to avoid the payment of taxes on the mortgage under the statutes of Michigan and that if the said J. Cotter Weber has any actual existence he never had any actual interest in either of said mortgages or notes, and that Joseph F. Weber and Frank J. Weber, the only persons with whom plaintiffs had any dealings, are the principals in the transaction. Finally, plaintiffs charge that Robert M. Dalton was in financial distress at the time that the said mortgages were given and was compelled to and did accede to the demands of the said Joseph F. and Frank J. Weber, who had knowledge of his condition, and in and by the said second note and mortgage agreed to pay them about $3,000 as a bonus for their aid in enabling him to secure a reconveyance of this property from the Detroit Fire & Marine Insurance Company.

J. Cotter Weber made a separate answer to the bill, in which he avers that he, through Frank J. Weber, his attorney in fact, lent Robert M. Dalton $10,000,

and, in substance and effect, that he knows nothing of any exaction such as is complained of in the bill, expressly denying the charge in the bill that no advancements other than the said check and a small sum for taxes were paid by him to said plaintiff.

Joseph F. and Frank J. Weber filed a joint answer to the bill, denying all charges of wrongdoing. Sarah A. Warner answered the bill and claimed affirmative relief, charging that her deed from the plaintiffs of the property in question was executed to secure the payment of certain moneys for which Robert M. Dalton was indebted to her. She asks that her lien be decreed to be a first lien upon the premises and that the mortgages hereinbefore described be declared to be usurious and of no force or effect against her, and if the court refuses that relief that the defendants Weber be ordered to account for all sums of money received by them usuriously, and she offers to do equity and to pay the amount of principal and lawful interest that shall be determined to be due upon said mortgages. The Webers answered the cross-bill of Sarah A. Warner, and so did the plaintiffs, the latter denying that Robert M. Dalton is indebted to Sarah A. Warner in any such sum as she claims in her cross-bill.

The cause, being at issue, came on for hearing in open court. Testimony was introduced, none of the Webers being called as witnesses. The learned trial judge was of opinion that the $18,000 mortgage, the first one hereinbefore referred to, was not affected, originally or in the hands of Weber, with any infirmity on account of usury; that the second mortgage included a bonus of $3,000, which made the mortgage usurious. A computation was made according to which he found the principal of the second mortgage to be $6,678.19, the amount of the taxes paid $486.96, total $7,165.15, finding the sum due upon both mortgages to be $26,668.25.

At the hearing the plaintiffs called as a witness Franklin E. Bushman, from whom certain testimony was elicited to the effect that he was in the real estate business in Detroit and in the business of loaning money; that one day in the office of Mr. Wilkinson, attorney for the defendants Weber, who was also his, Bushman's, attorney, he was recommended by Mr. Wilkinson to purchase a tax title which he understood was held by Mr. Faust, living in Cleveland, Ohio, and he instructed Mr. Wilkinson to go ahead and buy it for him; that Mr. Wilkinson furnished the money, which he charged to his, Bushman's, account, they having dealings together. The witness testified that he knew Joseph F. and Frank J. Weber and had had more or less business with them; that he understood that Mr. Wilkinson was acting as attorney for the Webers. There appears in the record no cross-examination of this witness. However, there was filed in the cause December 29, 1917 (the cause came on to be heard on the 21st of May, 1917), an order reciting that counsel for both parties having heard the testimony of Franklin E. Bushman,

"and it appearing to the court now herein that Franklin E. Bushman is a necessary party to said cause,"

—that under the authority of the provision of the judicature act (3 Comp. Laws 1915, § 12364) reading:

"No action at law or in equity shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require,"

—the court had power to add parties, and it was ordered that Franklin E. Bushman be made a party defendant, and that the order be entered *nunc pro tunc* as of May 21, 1917. Under the oral permission of the court, on May 21, 1917, the bill of complaint was amended by adding certain allegations thereto and

among them certain charges which are in effect that a certain tax certificate (city tax lease) affecting the property in question here, assigned to said Bushman by John Faust of Cleveland, is held by said Bushman for the defendants Weber, the real purchasers and owners thereof, and in addition to the other relief prayed for in the bill is the prayer that the defendants be required to come to a just accounting with plaintiffs as to said alleged tax title,

"to the end that the same may be dealt with and extinguished by the final decree of this court in said cause."

The decree, which purports to have been made on the 15th of September, 1917, contains the findings that on the 15th of September, 1917, there was due on the two mortgages $26,496.66, and that J. Cotter Weber is entitled to five per cent. interest on that amount from and after the date of signing the decree; that Sarah A. Warner has a claim against the property of $16,-167.36, subject to the said two mortgages.

"The court doth further find that J. Cotter Weber is purely nominal in the subject-matter of this litigation, and that the parties to be considered are Joseph F. Weber and Frank J. Weber, with whom all negotiations were carried on and completed."

It was further found that the Bushman tax lease was procured in the interest of Joseph F. and Frank J. Weber and should be canceled upon the payment of $650, with six per cent. interest from April 14, 1915. It is ordered that Bushman cancel his tax lease accordingly; that upon the payment of the sum found to be due thereon as stated, with interest, the sheriff's deeds referred to be canceled and removed as a cloud on the title of plaintiffs, and the time is fixed within which payment is to be made, and the rights of the defendant Sarah A. Warner as subsequent incumbrancer are declared.

The printed record does not disclose when the decree of the court was entered. It does appear from the printed record that the plaintiffs, the defendants Weber, the defendant Sarah A. Warner, and the defendant Franklin E. Bushman all claimed the benefit of an appeal to the Supreme Court therefrom. When these various claims were filed does not appear. The return, on file in the office of the clerk of this court, indicates that plaintiffs filed their claim of appeal October 13, 1917, the defendants Weber filed theirs October 17th, that the decree was entered September 26, 1917, and that defendant Bushman filed his claim of appeal December 10, 1917.

The plaintiffs, appellants, claim that the first or $18,000 mortgage was usurious as between plaintiffs and defendants (1) because it must be viewed as part of a single transaction, namely, the purchase of the property from the Detroit Fire & Marine Insurance Company, in which the defendants Weber participated, the alleged usurious exaction of $3,000 being a part of the whole transaction, (2) because the said mortgage in fact exacted more than seven per cent. interest, it having appeared that the Detroit Fire & Marine Insurance Company paid taxes on its personal estate at a rate of over two per cent.; that the second mortgage was usurious because given for $10,000, when as matter of fact $7,000, more or less, was the amount of money actually advanced by the Webers to the plaintiffs, and, both mortgages being usurious, no interest should have been allowed on either to the date of the decree.

We are of opinion that the evidence requires the conclusion that both mortgages are usurious, the first one upon the authority of *Union Trust Co.* v. *Radford*, 176 Mich. 50, the second one because it calls for a sum largely in excess of the amount actually paid to and received by the mortgagors. The contention of the

defendants Weber that J. Cotter Weber, the mortgagee in the second mortgage, is not shown to have had knowledge of the bonus paid to his attorney in fact, through whom, it is claimed, the loan was made and to whom, it is also claimed, he furnished the sum of $10,000, cannot be sustained. Assuming that where a mortgagee furnishes to his agent who makes the loan the full amount called for by the mortgage, the mortgage is not rendered usurious because the agent, by consent of the mortgagor, retains for himself a commission for procuring the loan (see, *Secor* v. *Patterson*, 114 Mich. 37; *Condit* v. *Baldwin*, 21 N. Y. 219; *Wyllis* v. *Ault*, 46 Iowa, 46), we are not satisfied that the principle can be applied here. Plaintiffs have assumed, but have not proved, that J. Cotter Weber is a fictitious, at least a mere nominal, party to the transactions above recited. That he is not a fictitious person seems to be proven by the power of attorney executed and acknowledged by him which is recorded in Wayne county, Michigan, and by the checks made by him by Frank J. Weber, his attorney in fact. He appears to be the mortgagee, the purchaser at the foreclosure sales, the person who furnished the money. The checks given were all drawn on the German-American Bank of Detroit, and there is one for $3,000, payable to the order of Robert M. Dalton, indorsed by Robert M. Dalton and by Frank J. Weber. Admittedly, this check represents a part of the sum of money making up the $10,000 secured by the second mortgage. The testimony of Robert M. Dalton, which is undisputed, is to the effect that this sum represents the bonus exacted by Frank J. Weber, the attorney in fact of J. Cotter Weber. If J. Cotter Weber is a nominal party, then, of course, the exaction made the note and mortgage usurious. If he is the real party in interest, the testimony, we think, should have gone farther and defendants Weber should have made it

appear that Frank J. Weber exacted the $3,000 for his own benefit, and not for the benefit of his principal. In form, whatever business was done appears to have been done for J. Cotter Weber by his attorney in fact. We are not required to infer, and indeed there is little room for the inference, that this money was an exaction or commission which benefited the agent only, unless the apparent agent was, in fact, the principal.

Plaintiffs should be permitted to redeem their property upon equitable terms. They have offered to pay the sums, principal and interest, which the court shall determine to be due. They contend that no interest should be paid, but only the amount of the money actually paid to and received by them. In making this contention, they are asking a court of equity to enforce a penalty, a forfeiture. It is clear, however, that the usurious lender is not in this case, nor in any other judicial proceeding, seeking to enforce usury. Upon the authority of *Vandervelde* v. *Wilson*, 176 Mich. 185, plaintiffs, having had the use of a certain sum of money for a certain period of time, ought to pay the legal rate of interest therefor for the time. This conclusion requires a modification of the decree in plaintiffs' favor.

But as to defendant Bushman the decree must be reversed. Assuming that he is nominal holder only of the tax lease, for the benefit of J. Cotter Weber, and is therefore a proper party to a bill filed to redeem the property from the liens of Weber, Mr. Bushman was not served with the process of the court, has had no opportunity to answer the bill of complaint, and has not been heard, as a party, in a proceeding to adjudicate his right.

We find no occasion for disturbing the decree as to defendant Sarah A. Warner.

A decree will be entered in this court permitting

plaintiffs to redeem upon payment, within 60 days after the decree is entered, of all sums of money advanced or paid out by defendant Weber on account of the said notes and mortgages, taxes, and for other purposes, with interest thereon at five per cent. per annum, less any and all sums of money paid by plaintiffs, whether as interest or as principal. As to defendant Warner, the decree of the court below will be affirmed. As to defendant Bushman, the decree is reversed, but without costs, the record remanded and leave given to the plaintiffs to properly bring him before the court below to answer the bill and for such further proceedings as are agreeable to equity and in accordance with proper practice. We have not overlooked the fact that Mr. Bushman did not in proper time claim an appeal. The decree against him is not reversed as upon his appeal, but is reversed because it affirmatively appears that the court below acquired no jurisdiction to adjudicate his rights and that as to him the decree is a nullity. The bill, however, is so framed (upon amendment) as to question his interest. If jurisdiction of his person is acquired, there appears no good reason for refusing, in this suit, to adjudicate the right which, as assignee of the tax lease, he asserts.

Plaintiffs will recover costs of this appeal as against the defendants J. Cotter Weber and Frank J. Weber.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

LEONARD-HILLGER LAND CO. *v.* WAYNE COUNTY BOARD OF AUDITORS.

1. PLATS—APPROVAL—MUNICIPAL CORPORATIONS—POWERS OF COUNTY BOARD—STATUTES.

The board of auditors of Wayne county, in the approval or rejection of plats of land submitted to it, is limited in its powers and duties by section 3350, 1 Comp. Laws 1915.

2. SAME—MANDAMUS.

Mandamus will issue to compel the board of auditors of Wayne county to approve a plat of land located in two townships of said county, which had been accepted by the township boards and which conformed to all statute requirements, where the reason given by the board for its refusal, viz., that it did not conform to adjoining plats, was not based upon evidence; there being in fact, at the time said plat was first presented, no adjoining plats.

Certiorari to Wayne; Codd, J. Submitted June 11, 1918. (Calendar No. 28,026.) Decided December 27, 1918.

Mandamus by the Leonard-Hillger Land Company to compel the board of auditors of Wayne county to approve a plat. From an order denying the writ, plaintiff brings certiorari. Reversed, and writ granted.

William Van Dyke, for plaintiff.

Paul W. Voorhies, Assistant Prosecuting Attorney, for defendant.

OSTRANDER, C. J. A plat of land lying in the township of Gratiot and Grosse Pointe township, in Wayne county, called Leonard-Hillger Land Company's subdivision of lots 16, 17, and 18 of plat of Private Claim 300, recorded in liber 221 of deeds, was approved by the authorities of both of said townships

and was offered for approval to the Wayne county board of auditors. Approval was refused. Relator, owner of the land, applied to the Wayne county circuit court for a mandamus to compel approval of the plat, an order to show cause was granted, an answer filed, and upon a hearing the writ was refused. Relator sued out of this court a writ of certiorari by which the record of the proceeding in the mandamus case is brought here for review. The learned trial judge delivered a short opinion, perusal of which will tend to make clear the legal proposition upon which relator rests the right to the writ of mandamus. He said:

"I don't believe that the legislature in the act intended that the duties of the board of county auditors should be purely clerical in nature as is practically claimed by relator in this case. Surely some one must be vested with some general supervision of the platting of property in any county. It seems to me that when the legislature selected three officials for a county they intended to invest them with certain discretionary powers and certain duties to see to it that the property within their jurisdiction was platted for the greatest good to the greatest number. If the contention of counsel were correct that where there are no adjoining plats, the plat must be accepted by the board, then it would become a case of first come first served.

"The plat in question was rejected under date of April 25, 1917, in writing, for the reason that 'the streets and alleys in such plat do not in our opinion conform to the general plan of the streets and alleys in the district of which said plat is a part.' There is ample testimony adduced to show that the platting of property as proposed by relators would work great hardships to adjoining property upon the west, and that also it did not conform to the general plan as stated in the notice in writing given by the board. There is also, of course, evidence introduced that the platting of the property in any other way might work a hardship to relator. At the same time it can be assumed that all of these matters were thoroughly

investigated by the board, and unless their finding was such as to amount to an abuse of discretion which I believe to be vested in them in this respect, the court should not interfere."

The powers and duties of the respondent board are set out in section 3350 of the Compiled Laws of 1915 as follows:

"* * * It shall be the duty of said board whenever any map or plat is submitted to them to carefully examine the same for the purpose of determining whether or not the caption of said map or plat conflicts in any way with the title or caption of any other map or plat previously recorded in the office of the register of deeds of said county, and also for the purpose of ascertaining whether or not the streets and alleys in such map or plat conform, in their opinion, to the streets and alleys of any adjoining map or plat heretofore recorded; and are so named that no name previously in use in the same city or village shall be made use of except in continuing a street or alley: *Provided,* That nothing herein contained shall require the dedication of any other or further streets than those shown on the plat; and for the purpose of determining whether or not the land included within the limits of said map or plat is suitable for platting purposes; and if, upon examination of said map or plat a majority of said board shall find that the title or caption does not conflict with that of any other map or plat, not vacated, recorded in such county, and the streets and alleys do conform to those of any adjoining map or plat theretofore recorded; and are so named that no name previously in use in the same city or village shall be made use of except in continuing a street or alley; and further, that the land included in said map or plat is suitable for platting purposes, and that said map or plat conforms to the requirements of this act, the said board shall endorse its approval thereon by the signatures of a majority of said board, but shall otherwise reject the same." * * *

It is possible that the board of auditors of Wayne county should be given larger powers in the premises than they now possess in order that plats of the land

adjacent to the city of Detroit may be adapted to a general plan insuring against ugly and inconvenient cutting up of private property into public plats. It is clear, however, as is discovered by reading the statute, that the power of the board of auditors in the premises is a very limited power.

In the case now presented it appears there is no general township plan in either of the townships in which relator's land is situated, at least no plan in either which has been followed. It appears there are private subdivisions and public plats in the neighborhood, but when relator's plat was presented for approval there was no other which was in the immediate neighborhood, none adjoining it, none to which it could conform if such conformation could be required. Relator's plat conforms with all statute requirements. This is admitted. It is true that before the respondent board passed finally upon the plat another plat of adjoining land—land adjoining part of relator's land —had been presented, and the board, in consequence, seems to have attempted to secure some modification of relator's plat. But relator's was the first plat offered for approval. The reason given for refusing to approve it must be accepted as the real reason. That reason does not appear to be based upon evidence.

The principles which must control construction and application of this statute have been stated and applied in *Campau* v. *Board of Public Works,* 86 Mich. 372; *Van Husan* v. *Heames,* 91 Mich. 519; *Klug* v. *Auditor General,* 194 Mich. 41; *Campau* v. *Board of Auditors,* 198 Mich. 468.

Under the circumstances, we are compelled to disagree with the learned trial judge, to set aside his judgment, and order that the writ of mandamus issue as prayed. No costs.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

OLSON MANFG. CO. *v.* REX MOTOR CO.

1. CORPORATIONS—CREDITORS' SUIT—MORTGAGES—VALIDITY.
   On appeal by judgment creditors of a motor corporation from a decree sustaining the validity of mortgages covering the real and personal property of said corporation, evidence *held*, sufficient to sustain the decree of the court below.

2. SAME—STOCKHOLDERS—PART PAYMENT FOR STOCK—LIABILITY FOR DEBTS.
   Where the incorporators of a motor corporation subscribed for a certain amount of its capital stock, part of which was issued and paid for, and later more stock was issued to one of them who divided it among the others, the consideration for which is not clearly explained, said stockholders are liable to the creditors of the corporation for the unpaid balance of stock subscribed for; there being no evidence of any agreement to pay for said stock by services or otherwise.

3. SAME—SEVERAL OBLIGATION.
   The obligation of a subscriber to pay for stock is a several obligation, which may not be diminished because some other delinquent subscriber cannot respond or cannot be brought within the jurisdiction of the court.

Cross-appeals from Wayne; Lamb, J., presiding. Submitted June 6, 1918. (Docket No. 57.) Decided December 27, 1918.

Judgment creditors' bill by the Olson Manufacturing Company and another against the Rex Motor Company, Charles H. Riopelle, and others. From the decree rendered, plaintiffs and defendant Riopelle appeal. Modified, and affirmed.

Frederick E. McCain (*Stevenson, Carpenter, Butzel & Backus*, and *William S. McDowell*, of counsel), for plaintiff Olson Manufacturing Co.

Ignatius J. Salliotte (*James O. Murfin*, of counsel), for defendants Riopelle.

OSTRANDER, C. J. This is a proceeding instituted by judgment creditors of the Rex Motor Company, who have made said company and Charles H. Riopelle, Eliza J. Riopelle, his wife, William J. Frasier, Alfred Robinson, and Frank Lemerise defendants. The company was incorporated in December, 1913, with an authorized capital of $75,000, with 7,500 shares. The declared purpose of the corporation was to manufacture, buy, sell, and deal with automobiles, automobile motors, transmissions, etc., and to carry on a general manufacturing and mercantile business at Ford, Wayne county, Michigan. Some, perhaps all, of the original incorporators had become interested in an attempt to develop and apply what appears to have been a novel idea in motor cars—a front wheel drive—and before the incorporation of the Rex Motor Company had spent some time, perhaps a little money, in this behalf. They capitalized their optimism, some labor, a little property and credit. At the hearing, one of them testified that—

"The blue prints of the front wheel drive and the blue prints of the motor are all that is left of the assets of the company for the general creditors now."

The same witness testified further:

"There was considerable experimental work done on this motor prior to the incorporation of the company by Mr. Blumstrom, Mr. Frasier and Mr. Lemerise. Before the organization we got together and planned for a factory site, and started to get material for building. We started the latter part of October, 1913, and prior to the time of incorporation I worked with the carpenters getting the material and getting the stuff on the ground. Mr. Lemerise, Mr. Frasier, Mr. Robinson and Mr. Blumstrom also did the same work. They had drafted designs for the engine and the motor

prior to the time of the incorporation and the five of us continued in this experimental work after the incorporation."

Of the capital stock, one-half, or $37,500, was subscribed by Riopelle, Frasier, Lemerise, Robinson, and Charles H. Blumstrom, in equal amounts. None of them paid in any cash, but Frasier, Robinson, Blumstrom, and Lemerise contributed certain personal property valued at $8,090, and Charles H. Riopelle contributed a parcel of real estate valued at $4,500. The personal property was later on mortgaged to Frasier, who assigned to another, not a party here; the mortgage was foreclosed and the property sold. The real estate was mortgaged to Mrs. Riopelle for $6,500, and her mortgage has been foreclosed.

It is a contention of the plaintiff creditors that as to them and other creditors these mortgages were void, and that the court should so declare and treat the property, real and personal, as assets of the company for their benefit. This contention the court determined adversely to them, and upon a review of the testimony, which will not be set out here, we decline to disturb the judgment of the trial court. It may, however, be said, in this connection, that the person who has apparent title to the personal property is not brought upon the record, that it is clear that Mrs. Riopelle advanced the money represented by her mortgage, that the corporation had the benefit of it, and that she is not shown to have participated in any purpose, if her husband and other shareholders had the purpose, to cover up assets of the company in fraud of creditors.

It is a further contention of plaintiff that some of these defendants should pay for the stock they subscribed for for the benefit of creditors of the company, and the court, being of this opinion, found that there is due from Charles H. Riopelle upon his original subscription $3,000. As he had purchased the

stock and interest of Alfred Robinson, the further sum of $5,480 was found to be due from him on that account, and, as he had also purchased the stock of Frank Lemerise, the sum of $5,470 was found to be due from him on that account—the total of these being $13,950. It was found that William J. Frasier is indebted to the company upon his stock subscription $5,480. The court also found there is due to certain judgment creditors of the Rex Motor Company—to Olson Manufacturing Company, $5,223.21, to Swope-McCracken Company, $68.18, to Advance Pattern Works, $309.25, to Knott & Jarlus Company, $158.01, exclusive of interest and costs in each case. As to defendants Robinson, Lemerise, and Mrs. Riopelle, the bill is dismissed. Defendants Charles H. Riopelle and William J. Frasier are ordered to pay plaintiffs' claims "in proportion to the amount of their indebtedness to the Rex Motor Company as herein set forth," together with the costs of suit. Eliza J. Riopelle is given costs in the sum of $20. The bill was taken as confessed by defendant Frasier. Defendant Charles H. Riopelle and plaintiff Olson Manufacturing Company appeal from the decree.

Riopelle's contention, briefly stated, is, that on the admitted facts liability for unpaid subscriptions to the capital stock cannot attach.

The court accepted the recitals in the articles of association as to what was in the first instance contributed by the associates, giving appellant credit for $4,500 for his real estate and Frasier, Robinson, Blumstrom and Lemerise credit each for one-fourth of the value of the personal property contributed. This personal property consisted of—

"Mahogany patterns for the manufacture of motor and transmission covering the entire construction of motor and transmission, all being located at 268 Junction avenue, Detroit, $2,250; one 14½ h. p. sample

and model motor and transmission now in operation and located at 268 Junction avenue, $2,350; drawings, tracings and blue prints covering all designs relating to the construction of motor and transmission, same being located at 268 Junction avenue, $2,800.00; tools and jigs located at 268 Junction avenue, $690; total valuation of which said property is taken, $8,090.00."

The incorporators never paid in anything more. What they did of record, is evidenced by the following:

"A special directors' meeting, village of Ford, Michigan, August 31, 1914. Special directors' meeting called by the president for the purpose of allotting stock to the five incorporators in the sum of $20,000 for their services in completing the Rex Front Wheel Drive. Moved by Frank Lemerise, that the 20,000 stock be issued to Charles H. Blumstrom and in return have same assigned over to William F. Frasier, $4,000; Charles H. Riopelle, $12,000 worth; $4,000, Alfred Robinson to C. H. Riopelle; $4,000, Frank Lemerise to Harry Riopelle; balance, $4,000, to Charles H. Riopelle's shares in said front wheel and friction motor drive automobile known as Rex Friction Front Wheel Drive. Supported by Charles H. Blumstrom, Lemerise, Frasier, and Riopelle, carried unanimously."

Concerning this, Mr. Riopelle testified:

"My own share according to that was $4,000. I think it was paid for in services, time and money expended since the date of incorporation. We credited up this stock $20,000 and reported it as additional value of patents and so forth. I had turned in real estate to the value of $4,500, which left $3,000 according to the books. I got $4,000 in value here in stock. I did not charge up to the company the $1,000 difference because I thought the stock was good. It was all right at that time in August, 1914. That was the same month we put a mortgage on the property to pay a note and our other little indebtedness. This company had never received any cash other than about $4,000 from these small stockholders. That was all the cash that the company had. What Lemerise, Blumstrom and Robinson collected; it didn't go through my hands. We never had six machines running at a time.

We never had but one. On August 31, 1914, we owed the bank $5,000 on a note and other indebtedness of about $1,500. We had about 82c in the bank at the time."

He also testified, referring to the $20,000 stock allotment:

"*Q.* What was the object of that?

"*A.* That was for our work and time and one thing and another and money expended in organizing the concern and extra pay. That was the understanding when we first organized. I don't know why we issued it all to him at first. He promised us he would return us $4,000 each. I couldn't tell you exactly what his promises had to do with it. That was the understanding at that time and before. The applications for the patents and everything were in his name. He signed them over to the company at that time and we issued all the stock to him in payment therefor. He did not make us a present of that stock. That was our proportion of the money advanced, our time and expenses. I advanced my expenses on the road right along. You will not find any expense account of mine in that book.

"The money that Blumstrom used to go to Chicago was company money. That was for the Exhibit 4, or $500.

"I paid my own fare, paid my own bills, and they paid their expenses on the road every day; car fare, traveling around, and expenses on the road, trying to sell stock. That was expenses trying to sell this stock. My expenses are not credited on my personal account. The $20,000 stock is just recompense for our time and expense. I spent more money beyond what is on the books. It cost me $5 or $6 a day on the road every day. I went all around, machine shops here and there, stopped in this place and that place, in Detroit, Ecorse, and different places. I went to Monroe and Mt. Clemens and around testing these automobiles. We had employees at our place who sometimes did testing. My son did the testing on one car. I ran one car. We wanted to advertise the car so as to get the car on the market in Wayne county. We didn't want to go out of Wayne county until we got started. Altogether we had 4 or 5 cars. Blumstrom, Robinson and

Frasier were the originators of this car. Blumstrom and Robinson were the inventors. We issued the $20,000 worth of stock to Blumstrom for the patents, designs, on this car, labor, etc. We all got a division of that $20,000 from Blumstrom by pre-agreement."

And:

"*Q.* * * * 'Moved by Frank Lemerise that $20,000 stock be equalized between the five stockholders. Carried.' What did you mean by that?

"*A.* By equalize I mean divided by five. I did not need $4,000 to equalize my subscription. I wanted all the stock I could get. With the exception of the $590 stock that was issued out of the treasury, there has been but $37,500 worth of stock issued all together. We never entered upon that subscription account other subscription which we had to the company for stock. I think we had some corporation by-laws. I couldn't tell you where they are. The directors had authority by the by-laws to place a chattel mortgage on the machinery and a mortgage on the property. We had by-laws, but I don't know where they are. In the case of Rundy we enforced the subscription to the stock of the company in court in behalf of the company. It is not on Exhibit B, the subscription account. On the subscription account are entered just the five original subscriptions, and we used Rundy's subscription and all the rest to balance these figures. If we had put all these subscriptions on the subscription account, there would have been a balance due there of some $24,000. The money paid that was received from the other stockholders and the $20,000 which we voted to ourselves balanced that account.

"*Q.* Now, there, all the money which was expended by you and Lemerise and from Frasier and from Blumstrom in going to Chicago and in experimenting with this car, and all the different things trying to develop this car, they drew back again, didn't they, at different times from the company?

"*A.* They drew back after we organized, they drew back what money they paid out.

"*Q.* And after you organized, they put in bills and drew it back from time to time?

"*A.* Sure; yes, sir.

"*Q.* Then for this $20,000 you furnished the company simply your services in soliciting and showing off this car to various people around in Wayne county, and your knowledge, whatever it happened to be, in regard to motors?

"*A.* Yes, me and the rest of the boys."

What stock was this, thus voted by the directors to themselves? The minutes do not purport to authorize a credit to these gentlemen upon their stock subscriptions. It is a vote of stock, to be issued and divided.

About this, defendant Robinson testified:

"*Q.* What do you know about this $20,000 dividend divided between the other gentlemen in August?

"*A.* I think it was something about $20,000 to be divided up for charges that we had to make.

"*Q.* Was that new stock in the company?

"*A.* I think so.

"*Q.* Was that new stock over and above $7,500?

"*A.* Yes, Blumstrom gave us that.

"I couldn't tell you whether it was to be new stock over and above the original incorporation or to be used in payment of old stock. I never understood it. I don't know when this was first spoken of. I do not now claim any portion of that $20,000. I sold all my rights that I had connected with this concern to Mr. Riopelle. I understood this $20,000 was to be for changes."

And defendant Lemerise testified:

"I agreed to take 750 shares, but we didn't intend to sell any more than we had to. We put in all the money that we had, then we finally ran out and had to sell stock in order to keep going. I put in lots of money, but I did not keep an account of the amounts that I put into this company. I drew out some money. I didn't keep account of my expenses in behalf of the company. I didn't get half of what I ought to have got for the work I did and the money that I put in. I did not keep track of the amount of money I put in. I presented to the company expense bills for the trip to the automobile show and a couple of tires, $198.92. We didn't get anything for our work. We didn't draw

any salary out of it. There wasn't any salary authorized to me. I don't think there was to Mr. Riopelle. I don't know anything about the books. I sold my stock to Mr. Riopelle for $1,000, 750 shares. I don't know whether I had any other stock or not. Later on we voted ourselves $20,000. I guess it was in addition to $7,500. I think that was $20,000 we raised when we put up the new car. That was included in the $7,500 I subscribed. We did not get any additional certificates. I don't know why this $20,000 was voted to Mr. Blumstrom entirely. It was too long ago. It is my signature to Exhibit A-17. At the bottom of that certificate. That was voted for the automobile front wheel drive. I can't recall why it was issued to Mr. Blumstrom first. I couldn't tell you why that particular transaction took place in that way. I did not get certificates for my portion of that $20,000. That was to complete the front wheel drive. Mr. Blumstrom set the figure at $20,000. I don't remember whether I was present at all these meetings. That was paid by our services in completing this front wheel drive."

Defendant Frasier, to whom the chattel mortgage was given, testified:

"The $20,000 was not in addition to the $7,500 which we subscribed. The $20,000 was to pay that subscription. I was present at the meeting, the minutes of which are shown on Exhibit A-17, where this stock is voted. It was voted to Blumstrom because we had our deal with Blumstrom, he was given $20,000 for his invention, his labor, his services rendered, his management and so on. He was the general manager and inventor of the machine and ran the factory. I bought that stock of Blumstrom afterwards. It was a bargain between us and him for so much and to take it in stock. I paid him $1 and other considerations and we paid a good many other dollars too. I bought that stock of Blumstrom and the others did the same.

"*Q.* And some of it, a big portion of it went to Mr. Riopelle, didn't it?

"*A.* What Mr. Riopelle bought and Lemerise bought and Robinson's direct from them.

"*Q.* When was this bargain made?

"*A.* When we first opened up there started the company, that was the bargain made between Blumstrom and the bunch, when we got the thing going good started in once, to get $20,000 for his inventions and the stuff that he had in looking after the thing. He was to draw no salary until the thing was complete. He just got $25, $50 and so on to live on. He got money from me and from Lemerise and from all of us. He still owes us for that money. On August the 3d we got going and voted this stock to him. He made demand because he had the thing perfected, and he transferred everything to the company. At the time of the incorporation the Rex Motor front drive was in the experimental stage; it was developed in a way and in an experimental way, and then we showed the first car in Chicago. Then when we came back they had to change this and they have been changing ever since. You can call it an automobile, call it complete as far as it is, and where it is, but for a perfect thing it never has been.

"*Q.* When you subscribed for 750 shares of stock you expected to pay for it? You understood that was a debt to the company?

"*A.* That was the understanding between Blumstrom and us at our first agreement, our first arrangements.

"I put in money at the time of the incorporation. Mine was all cash. It was money put into the company as they went along before the incorporation. That was the same as cash put in at the incorporation.

"*Q.* How did the voting to Blumstrom of $20,000 pay your debt on this subscription?

"*A.* Why, we canceled—it was voted to me then canceled off from my account to the company.

"*Q.* $4,000?

"*A.* Yes.

"*Q.* We are talking about the time of incorporation in December, 1913, there was $8,090 worth of property put in.

"*A.* Yes.

"*Q.* Of which you got a quarter, that was $2,020, wasn't it?

"*A.* Yes, sir.

"*Q.* That left $5,480 still due?

"*A.* Yes.

"*Q.* How did the voting to Blumstrom of $20,000 pay your debt to the company on this subscription?
"*A.* Why we canceled—it was voted to me then canceled off from my account to the company bank?
"*Q.* $4,000?
"*A.* Yes.
"*Q.* Where did the balance of $1,480 come from?
"*A.* I don't know."

Here is some evidence of confusion, but no evidence of payment for the stock subscribed for by the incorporators. Some of this testimony tends to prove an arrangement or agreement to aid Mr. Blumstrom, the inventor, in perfecting a car, in creating something for which there would be a demand, a salable thing, and when it was completed, with a going corporation behind it, stock was to be issued to Blumstrom for his invention, etc. But nothing of value was completed, and it does not appear that anything of value was by Blumstrom turned over to the corporation. It does not appear that there were any patents. What appears to have been attempted was to make use of the alleged Blumstrom agreement to relieve the original subscribers to stock of their liability to pay for the same. Assuming that stock of a corporation may be issued for property and for services in good faith performed for the corporation—that it can pay a debt for services with stock as well as with money—and assuming further, what is not, however, proven, that Blumstrom had earned $20,000 of capital stock, it is not perceived how the issue of stock to him would affect the subscription of others to whom he may have transferred some of his stock. It would increase their holdings, it could not pay their debt to the company. And if the stock was not voted to Blumstrom according to the theory that he had earned it, that it paid him what the company owed him, then he had no right to it at all. There is no reasonable theory according to which a vote of stock to Blumstrom and a

transfer of it by him to appellant could pay appellant's debt to the company, even if Blumstrom was a mere figurehead, a mere conduit.

No demands of these incorporators for services were ever allowed by the corporation. There is no evidence of any arrangement, any contract, to give their services to the corporation in payment for its capital stock. After the fact, the directors sought to dispose of all equitable, as they had theretofore disposed, or did soon thereafter dispose, of all physical, assets of this corporation, relieving themselves of the obligations of their respective contracts to pay for the stock they had subscribed for. We know of no adjudicated case and of no principle of law which will sustain appellant Riopelle's contention.

In one respect, the decree appealed from is wrong and ought to be modified. The obligation of a subscriber to pay for stock is a several obligation. See 3 Comp. Laws 1915, § 13596; 4 Thompson on Corporations (2d Ed.), § 5044; *Dieterle* v. *Paint & Enamel Co.*, 143 Mich. 416. Each demand, against each subscriber, is an asset of the corporation, which may not be diminished because some other delinquent subscriber cannot respond or cannot be brought within the jurisdiction of the court. Creditors of the corporation may in this proceeding look to each of them for payment. The ninth paragraph of the decree will be amended by striking out the words "in proportion," and as so amended the decree will be affirmed.

Defendant Eliza J. Riopelle will recover her costs of this appeal from the plaintiff, appellant. No other costs are allowed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

KIMMERLE *v.* LOWITZ.

1. ACCOUNT STATED—ACTION—MULTIPLICITY OF SUITS.
An account stated and the express or implied promise of one party to pay the amount of the balance indicated therein is none the less binding because one or more of the items, the factors, used in making up the account, are therein charged or credited upon a distinct promise and agreement of one or the other of the parties to do in the future some other or further thing with respect to such item or items.

2. SAME.
Where in a partnership accounting between plaintiff and defendant the latter was allowed credit for certain notes which he assumed and agreed to pay, but which he paid only in part, plaintiff paying the balance, an action thereon by plaintiff is not barred by recovery in a former action upon the account stated, although defendant had defaulted in the payment of the notes at the time suit upon the account stated was brought against him. FELLOWS, J., dissenting.

3. SAME—RES JUDICATA.
The validity of the account stated and the credit to defendant having been adjudicated in the former action, the question of the validity of the partnership between plaintiff and defendant, not having been then raised, is not open in this action.

Error to Cass; Des Voignes, J. Submitted June 13, 1918. (Docket No. 34.) Decided December 27, 1918.

Assumpsit by Charles H. Kimmerle against Elick Lowitz for an unpaid item in an account stated. Judgment for plaintiff. Defendant brings error. Affirmed.

Asa K. Hayden and *Gore & Harvey*, for appellant.

William F. McKnight (*Hatch, McAllister & Raymond*, of counsel), for appellee.

OSTRANDER, C. J. More or less complicated business transactions between the plaintiff and defendant were followed, as plaintiff claims, by an accounting between them, concluding with an account stated. Plaintiff sued defendant, and in the Federal district court for the western district of Michigan recovered a judgment, which was affirmed by the circuit court of appeals. 137 C. C. A. 415, 221 Fed. 857. The judgment has been paid. It was determined in that action, among other things, that there was a settlement, an account stated, which showed a balance due plaintiff from defendant of $7,883.08. The recovery was for this amount, less $500, which was paid after the settlement was made. It was also determined in the action brought upon the account stated that it had been agreed between plaintiff and defendant before the California corporation was organized that they would share the profits and losses of the venture.

In the account stated, an item of $4,700 was credited to defendant. This item was the amount of two notes made by the Kimmerle Concrete Machinery Company, a California corporation, to the Bank of Southern California, indorsed by plaintiff. These notes, when the settlement was made, were outstanding and unpaid, but it is the claim of plaintiff that the defendant assumed and agreed to pay them, for which reason he was given credit for them in the settlement. Defendant did not pay them, but did pay to plaintiff $2,000, which plaintiff paid on them.

The issue in the case at bar, as stated by the trial judge, is:

"This is not an action on an account stated, but for an unpaid item contained in the account stated, which plaintiff claims defendant had credit therefor in said account stated and assumed and agreed to pay the same, and an unpaid balance on October 12, 1911, of $2,959.68 and interest thereon since to date at the rate of 5 per cent. per annum, totaling, principal and in-

terest, on October 13th, as claimed, of 1916, of $3,599.60."

The jury was instructed that for plaintiff to recover he must prove by a preponderance of evidence that there was an account stated as claimed. The jury was further required to find whether there was an agreement made and entered into between the plaintiff and defendant prior to the organization of the California corporation that they would share the profits and losses of that business venture, the court, in this behalf, saying to the jury that an account stated cannot in and of itself and alone create liability; that there must be actually an account between the parties, items of debit and credit, which can be stated. The jury determined these issues in favor of plaintiff, and that defendant did assume and agree to pay the notes referred to, had not done so, and that plaintiff had been obliged to pay and had paid the balance of them as above set forth. They returned a verdict for plaintiff for $3,599.60, and upon the verdict a judgment was entered.

Defendant regards the following facts, among others, as important: The account was stated September 29, 1910. The bank which held the notes above referred to sued plaintiff thereon February 6, 1911, and plaintiff paid the bank October 12, 1911. Plaintiff's action upon the account stated was begun March 24, 1911 (it was begun in the State court and removed by defendant to the Federal court), and on January 21, 1913, plaintiff filed his bill of particulars, which recited only the settlement and its amount and contained an item for interest due thereon. The plea was filed in that cause February 4, 1913, and was the general issue, with claim of set-off. The cause was tried in March, 1913, the verdict being rendered March 22, 1913. So that it appears that judgment was rendered upon the account stated, it has been paid, that

the contract to pay the California notes entered into the action to the extent of $4,700, that plaintiff was sued on the notes in February, 1911, thereafter brought suit upon the account stated, and that all of these transactions were founded upon the alleged copartnership transaction between the parties. Upon these facts it is urged that plaintiff cannot recover, cannot split up his cause of action; having elected to sue and recover judgment upon the alleged account stated, this action is barred. It is further claimed that the alleged partnership, the basis of this and the former action, was in violation of sound public policy and therefore void. These are the principal contentions, relating to which and the theories according to which they are advanced errors are assigned upon rulings admitting testimony, upon the charge to the jury, and upon the refusal to give certain instructions preferred by defendant.

Aside from the contention that the alleged joint undertaking of the parties is void in law, the theory of defendant and the principles upon which it is developed are well stated in his brief as follows:

"An account stated supersedes the constituent items composing it. The action upon the account is predicated upon the new promise and undertaking; the account stated altering the character of the original indebtedness. When the account was had between the parties and a balance struck, the promise to pay and the agreement to accept such balance constituted a new contract between the parties. The constituent items were no longer material as evidence. The new undertaking furnished the sole right of recovery; and such cause of action cannot be split up into several parts and a separate action brought against defendant for each constituent part.

"All damages to plaintiff arising from this partnership transaction had fully matured on March 24, 1911, when plaintiff launched his first suit against the defendant upon the alleged account stated.

"The law limits the plaintiff to one action and such action must embrace all injuries proceeding from the same source. The plaintiff must elect his remedy. He may invoke equity and file his complaint there; he may sue at law for damages, but he cannot harass the defendant by piece-meal litigation."

The answer to this contention is, we think, and it is an answer which does not draw in question any of the principles stated, that an account stated and the express or implied promise of one party to pay the amount of the balance indicated therein is none the less binding because one or more of the items, the factors, used in making up the account, are therein charged or credited upon a distinct promise and agreement of one or the other of the parties to do in the future some other or further thing with respect to such item or items. Suppose, for example, that in a settlement between two persons who have engaged in a joint venture, and upon making up an account stated, a credit is given and it is expressly stated that it is the value of specific property to be thereafter delivered by the one to whom the credit is given either to the other or to some third person. Or, suppose there are a number of debts for which both are liable, and in the account each assumes and agrees to pay certain of them. Is it in its legal aspect anything more or less than an account stated upon which suit may be brought? Is it any less an account stated when credits are given upon promises not expressly set out in the account itself? Suppose a different, but similar, case. In a settlement between joint adventurers, one turns over to the other personal property, as a horse or an automobile, and receives a credit for an agreed-upon sum therefor on the account stated. It turns out later that he had no title to the property, and meantime the balance shown by the account is paid. Has the other party no remedy? The argu-

ment for defendant, appellant, leads, finally, to this: One who has received a credit in an account stated, as in the case at bar, may defeat an action upon the account stated by refusing before suit is brought upon the account stated to keep the promise upon which the credit was given. The principle controlling determination of the precise question presented would be the same if defendant had voluntarily paid the balance shown by the account stated. The holder of the notes he assumed and agreed to pay would have no right of action against him. If plaintiff, who was obliged to pay them, had no right of action, the result would obviously be morally wrong.

We do not regard it as important to state or in any way to review the facts antecedent to the judgment in the Federal court. They are stated with some detail in the opinion, 137 C. C. A. 415, 221 Fed. 857. It was conclusively determined by that judgment that the parties had with each other an account which they settled and stated. It was determined that by agreement the profits and losses of the California corporation venture were to be shared by them. It is not perceived how the facts thus determined can be regarded as disputable by defendant in this suit.

We find no legal objection to the course pursued by the plaintiff in this case. The established facts require the conclusion that defendant in paying the balance shown by the account stated to be due, and in refusing to pay the amount of the notes for which he received a credit in the account, has profited, at the expense of plaintiff, and in violation of his undertaking made to plaintiff, by the sum represented by the judgment. This is a different cause of action from the one instituted upon the account stated. It rests, it is true, in part, upon the account stated and, more remotely, upon the original undertaking of the parties; it is not an action upon the account.

It is said the alleged partnership is void because against public policy, and that in the suit upon the account stated this point was not raised and not decided. We think the point is not now open to defendant. As between himself and plaintiff, defendant received a credit in an account stated, the validity of which has been adjudicated. Out of that, and defendant's promise to pay the notes representing the credit, his refusal, and plaintiff's payment of them, this cause of action arises. That the item of credit represented the notes of the California bank is not disputed, except as the account itself and all of it is disputed. That defendant agreed with plaintiff to pay them is determined by the verdict as well as that plaintiff paid them.

With respect to issues open to defendant upon the trial of this cause, no errors were committed. As to those raised, but settled in the suit upon the account stated, the court, it is assumed out of abundant caution, submitted them to a jury but should have determined them as matter of law.

The judgment is affirmed, with costs to appellee.

BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred with OSTRANDER, C. J.

FELLOWS, J. (*dissenting*). The theory upon which the plaintiff recovered in this case was that he and defendant had agreed to share the losses of the Kimmerle Concrete Machinery Company; that on September 29, 1910, the parties came to an accounting upon such agreement; that upon such accounting a considerable sum of money was found to be due the plaintiff; that there was an account stated; that defendant was given credit in such account stated with the sum of $4,700, the amount of certain notes given by the company to the Bank of Southern California and indorsed by plaintiff, which notes defendant then agreed

to pay. Plaintiff also claimed that upon such accounting there was found to be due him the sum of $7,883.08, which defendant also then agreed to pay. It is the plaintiff's claim that but $2,000 was paid by defendant on these notes. Defendant refused to pay the $7,883.08 to the plaintiff, paid no further sum on the notes, and on February 6, 1911, plaintiff was sued by the Bank of Southern California for the amount due on them. If the plaintiff's claim is taken as true the defendant made two promises, one to pay plaintiff $7,883.08 and the other to pay the Bank of Southern California the amount of the notes; these two payments to extinguish defendant's liability growing out of the California venture, and to settle and pay the account stated. Both promises were bottomed on the same transaction, had the same consideration, were made at the same time, were the result of the same accounting, both entered into the same account stated, and both constituted a part of the one contract of settlement of the differences between the parties. The breach of both promises had occurred when plaintiff brought his first suit. Had defendant promised to pay the amount found due the plaintiff upon such accounting in three equal monthly installments, and had breached his agreement in regard to all three of the installments, it could not be successfully urged that plaintiff had the right to split up his cause of action into three separate and different suits. He could in one action recover for all three of the installments and would be required so to do. *Kruce* v. *Lakeside Biscuit Co.*, 198 Mich. 736. I think the instant case is ruled by that case, and that a verdict should have been directed for the defendant.

PEOPLE *v.* ONESTO.

1. CRIMINAL LAW—MURDER—EVIDENCE — SUFFICIENCY — QUESTION FOR JURY.

   In a prosecution for murder, evidence reviewed, and *held*, sufficient to furnish a foundation for the inference of guilt which the people sought to draw from it, and that the court below was not in error in submitting to the jury the question of defendants' guilt.

2. SAME—JOINT DEFENDANTS—CONSPIRACY—TRIAL — INSTRUCTIONS —EQUALLY GUILTY.

   Where defendants were jointly charged with murder, it being the theory of the people that they conspired together in Chicago to kill deceased and that they came to Benton Harbor and worked it out in accordance with a preconcerted plan, and there was no room in the testimony for the jury to find that one defendant, although he did not actually do the killing, was guilty of any other or different offense than the other, the court was not in error in instructing the jury that he was equally guilty or should be acquitted.

3. SAME—MANSLAUGHTER—INSTRUCTIONS.

   Where the court, in his principal charge, defined at some length murder in the first and second degrees, also manslaughter, and later, in reply to the request of a juror, defined manslaughter again, there is no merit in the complaint that he did not draw a distinction between second degree murder and manslaughter in reply to the request of the juror.

4. SAME—EXHIBITS IN JURY ROOM—DISCRETION OF COURT—APPEAL AND ERROR.

   Where the particular circumstances attending the refusal of the court below to allow an exhibit to be taken to the jury room do not appear in the record, it cannot be said by this court that there was an abuse of discretion.

Error to Berrien; Bridgman, J. Submitted June 14, 1918. (Docket No. 102.) Decided December 27, 1918.

Tony Onesto and Frank Damico were convicted of murder in the second degree. Affirmed.

Frank De Bartolo and *O'Hara & O'Hara,* for appellants.

Alex. J. Groesbeck, Attorney General, and *John J. Sterling,* Prosecuting Attorney, for the people.

BIRD, J. Respondents were jointly charged in the Berrien circuit court with having murdered one Henry Pontorno in that county on August 1, 1916. They were found guilty of murder in the second degree and sentenced on March 5, 1917. The proceedings have been brought to this court for review with the claim that errors were committed on the trial which should reverse the judgment of conviction.

1 and 2. The first and second errors assigned are based upon the refusal of the court to direct a verdict for defendants, or either of them, at the close of the people's case. It is the claim of counsel that the testimony did not warrant the conviction of either respondents, especially of Damico.

The proofs upon which conviction was had show substantially the following facts: Respondents are Italians and relatives, Onesto being the uncle of Damico. They have resided in the city of Chicago for several years. They left Chicago on the morning of July 31, 1916, in pursuance of an arrangement, which they had previously made in a saloon, to go to Benton Harbor. They arrived there at about five o'clock in the afternoon. They made inquiry of a real estate man in Benton Harbor where Pontorno lived. Upon being advised they engaged a taxi and drove nearly to Pontorno's home in the country when they alighted and discharged the chauffeur, saying to him they would walk the rest of the way. They soon changed their plans and returned to Benton Harbor because

of the suggestion of Onesto that they might not be well received by Pontorno at that hour of the day. From Benton Harbor they went to Coloma, a distance of six or seven miles from Pontorno's home, where they registered at a hotel under assumed names and spent the night. In the morning they arose and went directly to Pontorno's home. Upon arrival they did not find him there. They were well received by Pontorno's wife and by Pontorno when he returned. The three visited, looked about the farm and afterwards had dinner together. About 3:30 o'clock in the afternoon Pontorno hitched his team to a light wagon to return a mechanic, temporarily in his employ, to the interurban station. Pontorno invited the respondents to accompany him and they did so after some hesitation. In returning from the interurban station Damico rode in the seat beside Pontorno. Onesto occupied the rear seat alone. When nearing Pontorno's home, in a secluded point in the highway, Pontorno was shot and killed, one shot entering the back of his head, another the shoulder and a third passing through the heart. He was dragged for some distance through the grass, leaving a bloody trail, to a nearby orchard where he was found a few hours later. Respondents fled to Chicago where several months later they were apprehended and brought to Berrien county for trial.

The deceased was also an Italian, and appears to have formerly resided in Chicago. He and the respondents were well acquainted and had had business dealings. While in Chicago Pontorno was engaged in banking and in connection therewith ran a real estate business and a steamship ticket office. It appears that at one time Onesto, a relative, and Pontorno purchased certain real estate in Chicago for the price of $66,000. Pontorno had charge of it and collected the rents. Failing to account to his co-owners a suit was begun by Onesto to compel him to make an accounting,

and considerable bad feeling was engendered by this litigation, it being the claim of Onesto that Pontorno robbed him. Soon after the termination of the litigation, and in 1915, Onesto was shot by some unknown person, and it appears that Onesto charged Pontorno with either doing it himself or causing it to be done. Soon after this trouble Pontorno moved to Berrien county and purchased a farm a few miles from Benton Harbor, where he had since resided.

Before the trial was over the respondents took the stand and testified in their own behalf. Onesto admitted that he shot Pontorno but claimed that he did it in self defense. Onesto gave the details of the shooting and described what led up to it, as follows:

"On the way back (from the interurban station) he was showing us the different places and explaining things to us. After we had gone quite a ways we got to a big hill and he pointed towards his farm and said: 'Look at my farm there, I certainly have it real nice out here.' I then said to him: 'Yes, your farm out here is certainly wonderful, but you have left two of us fathers out in the street without any money (by us I meant my other nephew whose name is also Frank Damico, and myself).' And he said to me: 'Well, what do you want here? Did you come all the way out here to break my testicles? Wasn't it enough when I gave you one shot full in Chicago? Do you want another one here?' "

It was Onesto's claim that following this conversation Pontorno jumped to the ground and that he followed him and a struggle ensued in which he wrested Pontorno's gun from him and shot him three times. Damico testified that he took no part in it, and was corroborated by Onesto.

It was the theory of the people that the respondents conspired in Chicago to go to Benton Harbor and take the life of Pontorno, and that the motive therefor was to be found in their quarrels over business

dealings in Chicago as well as in the shooting of Onesto which, whether rightfully or wrongfully, he charged to Pontorno. After reviewing the testimony adduced at the trial, we are of the opinion that it was sufficient to furnish a foundation for the inferences of guilt which the State sought to draw from it. The trial court was in no error in submitting to the jury the question of respondents' guilt.

3 and 4. After deliberating several hours the jury were brought into court and the following colloquy took place:

"*The Court:* Gentlemen of the jury, I am advised that you have not yet agreed upon a verdict. Is there anything, any principle of law upon which the court can assist you?

"*A Juror:* No, I don't know as there is.

"*A Juror:* One thing I would like to speak to you about, the jury would like a little information. We understood in the charge to the jury that if we saw fit to find Frank Damico guilty that he would be equally guilty with Onesto? Is that right?

"*The Court:* Yes, I think so, under the instructions I gave you.

"*A Juror:* In your instructions, if we found him guilty of anything, he has got to be equally guilty with Onesto?

"*The Court:* Yes, I think that is correct under the facts, as I understand them in this case.

"*A Juror:* As I understand your charge, Judge, if we find Tony Onesto guilty, we will say of murder in the first degree or second degree, either one, that we had to find Frank Damico equally guilty.

"*The Court:* Oh, no.

"*The Juror:* Or discharge him?

"*The Court:* Or discharge him, that will do.

"*The Juror:* Either equally guilty or acquittal?

"*The Court:* I think that is correct, Mr. Foreman.

"*The Juror:* That is the point I want information on.

"*The Court:* I think that is correct, that is, under the facts in this case."

Error is assigned upon that part of the colloquy in which the court instructed the jury that in the event they found Damico guilty they should find him equally guilty with Onesto, or acquit him. It is hardly fair to the trial court to construe this language independently of the main charge. It was the people's theory that the respondents conspired to take the life of Pontorno and that they came to Benton Harbor and worked it out in accordance with the preconcerted plan. The people's case was put before the jury on this theory. They were instructed in the main charge that:

"The defendants are jointly charged with the murder of one Pontorno. The people claim that the two defendants, Onesto and Damico, came from Chicago with the intent and purpose of killing Pontorno, that they were acting together with a common intent, and on August 1st, 1916, Pontorno was murdered by them. * * *

"If the jury believe, beyond a reasonable doubt, from all the facts and circumstances in the case, that the two respondents acted with a common intent to kill Pontorno—acting with a common intent to kill Pontorno, came from Chicago, and Onesto killed Pontorno in carrying out such common intent, then Damico would be equally guilty with Onesto; but if Damico was not immediately present when Onesto killed Pontorno, had nothing to do with the killing, and had not been acting with Onesto with such common intent, then Damico would not be guilty. * * *

"If the jury believe, beyond a reasonable doubt, that the respondents were acting in concert with a common intent, as I have before stated, when Onesto killed Pontorno, and if you find Onesto guilty, then Damico is equally guilty.

"If, on the other hand, when Onesto killed Pontorno, he was acting in self-defense, under the suggestions as I have before stated, then both defendants are not guilty. In accordance as you determine what the evidence shows, one of three verdicts can be rendered by you; murder in the first degree; murder in the second degree; manslaughter or acquittal."

If Onesto did the shooting and Damico was present, aiding and assisting him in the commission of the crime, he would be equally guilty with Onesto. On the other hand, if he was not aiding and assisting Onesto in the commission of the crime, he was entitled to a verdict of acquittal. We see no room in the testimony for the jury to find that Damico was guilty of any other or different offense than Onesto was. Under the people's theory, if he were not guilty of the same offense Onesto was, he was entitled to a verdict of acquittal. Under Onesto's theory of self-defense Damico was entitled to a verdict of acquittal. Unless the proofs showed that the jury would have been justified in convicting Damico of an offense of lesser grade, there was no occasion for the court to instruct them in regard to it. *People* v. *Ezzo*, 104 Mich. 341; *People* v. *Repke*, 103 Mich. 459. We, therefore, conclude that the instruction was proper under the circumstances of this case.

5. Complaint is made because the court did not draw a distinction between second degree murder and manslaughter in reply to the request of a juror. The court, in his principal charge, defined, at some length, murder in the first and second degrees, also manslaughter, and later in reply to the request of the juror he defined manslaughter again, saying in part:

"*The Court:* I want to give it to you, as near as I can, just as I instructed you before. You understand, gentlemen, what murder in the first and second degree consists, I suppose, and that what you want is simply a definition of manslaughter? Now, manslaughter is the unlawful killing of another without malice, express or implied. The offense is one that is committed without malice or premeditation." * * *

There appears to be no merit in this contention.

6. The pantaloons worn by the deceased at the time he was killed was offered and received as an exhibit. Some time after the jury retired to consider their ver-

dict they advised the court through the attending officer that they desired to examine the pantaloons in the jury room. The court denied their request. It does not appear whether any objection was made by the State or for what reasons the trial court denied the request. The question whether exhibits admitted upon the trial shall be taken to the jury room is one of discretion with the trial court. *Bulen* v. *Granger,* 63 Mich. 311; *Tubbs* v. *Insurance Co.,* 84 Mich. 646; *Walker* v. *Newton,* 130 Mich. 576; *Farrell* v. *Haze,* 157 Mich. 374; *People* v. *Tibbetts,* 173 Mich. 628; *Silverstone* v. *Assurance Corporation,* 187 Mich. 333; *People* v. *LaLonde,* 197 Mich. 76.

We cannot say in this instance that the court abused his discretion inasmuch as the particular circumstances attending his refusal do not appear of record.

The trial of this cause was a long one in which both sides of the controversy were well presented. The instructions of the trial court were fair and impartial. Under these conditions the jury has done its duty and recorded its verdict. No reversible error having been pointed out in the proceedings, the judgment of conviction must be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SPRATLER *v.* SPRATLER.

1. DIVORCE—ALIMONY—DOWER—STATUTES.

The provisions of Act No. 259, Pub. Acts 1909 (3 Comp. Laws 1915, § 11436 *et seq.*), providing that whenever any decree of divorce is granted it shall be the duty of the court to include in it a provision in lieu of the wife's dower, being inconsistent with section 11415, 3 Comp. Laws 1915, providing that, when a divorce is decreed in certain cases, the wife shall be entitled to dower in the lands of the husband, *held*, that the latter statute is repealed by implication. OSTRANDER, C. J., and MOORE, J., dissenting.

2. SAME.

Where, in divorce proceedings, the evidence shows that, at the time of the marriage, defendant husband was 60 years of age and the wife 24, that they lived together about four and one-half years, during which time defendant's fortune was not materially increased by plaintiff's efforts, that the fair value of his real property was $30,000, and his personal $5,642, exclusive of household goods, an award to plaintiff of $5,000 in lieu of dower, household furniture of the value of $846, and taxable costs including an attorney fee of $350, will not be disturbed on appeal, as either unfair or inadequate, although defendant was guilty of extreme cruelty and adultery.

Appeal from Kent; Perkins, J. Submitted June 6, 1918. (Docket No. 41.) Decided December 27, 1918.

Bill by Lida Spratler against Joseph Spratler for a divorce. From a decree for plaintiff respecting alimony, she appeals. Affirmed.

Don E. Minor, for plaintiff.

H. Monroe Dunham, for defendant.

BIRD, J. Plaintiff filed her bill praying for a decree of divorce from defendant on the grounds of extreme

See note in 44 L. R. A. (N. S.) 998.

cruelty and adultery. Upon the hearing of the cause the chancellor was persuaded that defendant was guilty of both charges and accordingly granted plaintiff relief, announcing at the time that he would hear the parties later on the question of alimony. Subsequently the matter was taken up and testimony offered bearing upon the value of defendant's property, which was largely real estate, situate in the city of Grand Rapids. The conclusion reached by him was that a fair value of the real estate was $30,000, and the personal property $5,642, exclusive of household goods. Upon this valuation the chancellor awarded plaintiff $5,000 in lieu of dower, household furniture of the value of $846, and taxable costs including an attorney fee of $350. Plaintiff was dissatisfied with this award and has appealed to this court.

Plaintiff makes the point that defendant having been found guilty of the charges of misconduct and adultery, she is entitled to dower under the following statute:

"When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or for the misconduct, or habitual drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to her dower in his lands in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce." 3 Comp. Laws 1915, § 11415.

Defendant denies that the foregoing statute is applicable to the present situation by reason of the passage of Act No. 259, Pub. Acts 1909 (3 Comp. Laws 1915, § 11436 *et seq.*), the material portion of which reads:

"When any decree of divorce is hereafter granted in any of the courts of this State, it shall be the duty

of the court granting such decree to include in it a provision in lieu of the dower of the wife in the property of the husband, and such provision shall be in full satisfaction of all claims that the wife may have in any property which the husband owns, or may thereafter own, or in which he may have any interest."

The question therefore presented for our consideration is, to what extent section 11415 was affected by the passage of Act No. 259.

1. Both of these statutory provisions deal with the same subject-matter. Act No. 259 makes no reference to the former one. In section 11415 the legislature itself fixes the alimony which a wife shall be entitled to, if granted a decree of divorce on the ground of misconduct or adultery. Act No. 259 confers upon chancery courts in all cases the power to fix a provision in lieu of dower. It is quite apparent that these provisions are conflicting and are therefore repugnant. The only way, which occurs to us, that they could be construed so that both might stand would be to say that Act No. 259 confers upon chancery courts the power to fix the value of the alimony which the legislature has granted. Prior to the passage of Act No. 259 a decree of divorce rendered on the ground of misconduct or adultery invariably led to another proceeding before the wife could secure the possession of her alimony. This complicated and delayed such proceedings. Another difficulty frequently met with by chancery courts in determining the question of alimony was the ownership of property by the entireties. The court lacking adequate power to deal with these tenures made property adjustments difficult. A consideration of Act No. 259 in connection with the practice prior to its passage leads to the conclusion that this legislation was passed to meet these difficulties and to confer upon chancery courts the power to dispose of the questions of divorce and alimony in one proceeding.

While this court has never had occasion to pass directly on this question its attitude in disposing of alimony questions since the passage of Act No. 259 has been consistent with this construction. Our conclusion is that section 11415 was repealed by implication by the passage of section 1 of Act No. 259, Pub. Acts 1909.

2. But plaintiff argues that if this be the proper view the allowance was inadequate, considering the value of defendant's property. When all the circumstances are considered, the award which was made does not appear to be unfair or inadequate. At the time of marriage defendant was 60 years of age and plaintiff 24. They lived together about four and one-half years. The testimony indicates that plaintiff was industrious and a good housewife, and besides was helpful to defendant in his work as an undertaker, but it does not appear that defendant's fortune was increased to any considerable extent by her efforts during the time they lived together. The valuation placed upon the property by the court was a fair one and we think neither the valuation of the property nor the award of alimony should be disturbed.

The amount paid by defendant, under the order of this court, for plaintiff's weekly allowance and counsel fees will be credited on the decree for permanent alimony. The conclusion reached by the trial court will be affirmed. No costs in this court will be allowed either party.

STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with BIRD, J.

OSTRANDER, C. J. In my opinion the act of 1909 did not repeal section 11415, 3 Comp. Laws 1915. The two statutes must be read together. I agree to the affirmance of the decree.

MOORE, J., concurred with OSTRANDER, C. J.

WOOLFITT *v.* PRESTON.

1. WILLS—LIFE ESTATES—LIMITED POWER OF DISPOSAL.
   Under a provision of decedent's will bequeathing to her oldest daughter the homestead, including furnishings and piano, with authority to use or sell it if it seems best to do so, using the principal for her own and children's support, if necessary, and at her death the property, or what remains of it, to be equally divided between two other daughters, and at their death, if the property still remains intact, to be divided between two grandchildren, the oldest daughter took a life estate with power to sell if she deems best, and the further right to use such part of the proceeds as is necessary in the support of herself and children, but for no other purpose; the other daughters took a life estate subject to the above provisions; and the two grandchildren took a vested interest in the remainder.

2. SAME—EXECUTORS AND ADMINISTRATORS—BONDS.
   Where the mother did not impose any terms of security upon the oldest daughter, none will be required by the court unless she exceeds the limits of good faith in the administration of the fund.

3. SAME—LIFE ESTATES—SUSPENDING POWER OF ALIENATION—TWO LIVES IN BEING.
   The contention that said provision of the will attempts to suspend the power of alienation for a longer period than during the continuance of two lives in being (3 Comp. Laws 1915, §§ 11532, 11533), cannot be sustained, since the devise to the two younger daughters is that of one life estate devised to both, to be enjoyed by them in common.

Appeal from Genesee; Stevens, J. Submitted June 4, 1918. (Docket No. 23.) Decided December 27, 1918.

Bill by Martha B. Woolfitt and another against Claudia M. Preston and others to construe the last

will of Augusta N. Bannister, deceased. From a decree for plaintiffs, defendants appeal. Affirmed.

George W. Cook, for plaintiffs.

Carton, Roberts & Stewart, for defendants.

BIRD, J. Augusta N. Bannister, a resident of Flint, died testate in October, 1915, leaving three daughters, Claudia, Martha, and Florence. Her will was admitted to probate without contest. It contains the following provision:

"I give, devise and bequeath to my oldest daughter, Claudia, what is known as the old homestead, situated on Harrison street between Second and Third streets, No. 615. I will to Claudia this home and furnishings, including piano. Claudia to have entire control of this property during her lifetime; rent the property and collect the rents as she desires. If there is good opportunity to sell this property and it seems best to sell it, she may do so, using the interest on same. If necessary to use principal for herself and children's support, she may do so. The interest from this property to be used as far as possible for her own support and children's education. At Claudia's death, I wish this property, or what is remaining of it, to be equally divided between Martha and Florence. If the property still remains intact at their death, I wish it to be divided between my granddaughters, Helen and Ruth Preston. If there are other grandchildren, all are to share alike. * * * If Martha and Florence are not both living at Claudia's death, then the one who is living shall have possession of the Harrison street property. If both are not living, then the property will go to my grandchildren and be divided equally between them."

The daughters being unable to agree among themselves as to the construction which should be given to this paragraph of the will, Martha and Florence filed this bill to obtain a judicial construction thereof. Martha and Florence contend that Claudia has only a

life estate in the premises with a limited power of disposal. Claudia claims that the devise gives her an estate in fee, for reasons which we shall presently consider.

1. Counsel for Claudia contend that the language of the devise brings the cause within the holdings of *Jones* v. *Jones*, 25 Mich. 401; *Dills* v. *Latour*, 136 Mich. 243; *Moran* v. *Moran*, 143 Mich. 322 (5 L. R. A. [N. S.] 323, 114 Am. St. Rep. 648); *Killefer* v. *Bassett*, 146 Mich. 1; *White* v. *Railway Co.*, 190 Mich. 1; while counsel for Martha and Florence insist that the case comes within the construction of *Jones* v. *Deming*, 91 Mich. 481; *Gadd* v. *Stoner*, 113 Mich. 689; *Farlin* v. *Sanborn*, 161 Mich. 615 (137 Amt. St. Rep. 525); *In re Moor's Estate*, 163 Mich. 353; *Bateman* v. *Case*, 170 Mich. 617.

The test suggested by *Gadd* v. *Stoner*, *supra*, which has been followed by some of the cases, is "whether the will gives an unlimited, or only a modified power of disposition in the first taker." The power of disposition contained in this devise does not appear to be an unlimited one. It does not give Claudia permission to sell the premises and dispose of the proceeds for any purpose she may choose. It does authorize her to make a sale thereof if she deems best and a favorable opportunity offers, but it limits the expenditure of the proceeds to her and her children's necessities. To expend the proceeds for any other purpose would be a clear violation of the express terms of the devise. The testatrix makes her intent very clear that the proceeds of the premises, if sold, shall be devoted to the care and support of Claudia and her children. This conclusion brings the case within the holding of *Gadd* v. *Stoner*, and kindred cases heretofore cited. Our conclusion is that Claudia takes a life estate in the premises with the power to sell them if she deems best, and the further right to use such

part of the proceeds as is necessary in the support of herself and children, but for no other purpose. Subject to these provisions Martha and Florence take a life estate and Helen and Ruth Preston a vested interest in the remainder.

2. Counsel suggest if this conclusion be reached and a sale should be made Claudia should be required to give a bond to protect the proceeds against unauthorized expenditure. The fact must not be overlooked that this property belonged to the mother and that she had a right to do with it as she pleased. She has seen fit to give it to Claudia under these conditions without imposing any terms of security, and none will be imposed unless she exceeds the limits of good faith in the administration of the fund. 18 Cyc. p. 614; *Gadd* v. *Stoner, supra; Chamberlain* v. *Husel,* 178 Mich. 1.

3. A further reason suggested why the devise should be construed to be a fee in Claudia is that the testatrix has attempted by this provision of her will to suspend the power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, which is prohibited by our statutes. See sections 11532, 11533, 3 Comp. Laws 1915.

To bring the devise within these sections counsel reason in this wise:

> "*First,* Claudia is given a life estate; Martha is given a life estate, and Florence is given a life estate, and remainder over to Helen and Ruth Preston, and other grandchildren, if any."

We think counsels' reasoning is erroneous in assuming that the estate given to Martha and Florence represents two life estates instead of one. A fair interpretation of the language of the devise is that one life estate is devised to both Martha and Florence, to be enjoyed by them in common. In other words, an undivided one-half to each. The language of the tes-

tatrix is: "At Claudia's death, I wish this property, or what is remaining of it, to be equally divided between Martha and Florence." By no reasonable construction could this be construed as giving whatever remains to Martha as long as she lives and afterwards to Florence during her life. We are of the opinion that this point is not well taken.

The conclusions which we have reached upon these questions are the same as were reached by the chancellor, therefore, the decree of the lower court will be affirmed. Plaintiffs will recover their costs in this court.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

MARCOUX *v.* REARDON.

1. CORPORATIONS—WINDING UP—SALE OF CORPORATE ASSETS.
   While the statutory method of appointing a receiver for winding up the affairs of a corporation when in failing condition would be more regular and apparently the wiser course in case of an objecting stockholder, the statute does not make unlawful other methods taken by authority of the majority, where all have equal opportunities to purchase the stock of others or assets of the corporation at public or private sale.

2. SAME—MAJORITY CONTROL.
   In corporations organized for business purposes and for the private gain of their members, the principle of the rule of the majority obtains to the extent that if the majority conclude that the business cannot be carried on with profit or advantage to all, they may, against the will of the minority, elect to wind it up.

3. SAME—FRAUD—ACCOUNTING—PLEADING—AMENDMENT—EQUITY.
On a bill by a stockholder in an elevator corporation for the value of his stock, alleging fraud by other stockholders in the sale of its property and assets for the purpose of paying its debts, pursuant to a vote by a majority of the stockholders, defendants were not equitably entitled to an amendment of the bill allowing the corporation to be made a party plaintiff, and then allowing one of the defendants to amend his answer by adding a cross-bill for the purpose of quieting his title to said property, which neither the corporation nor plaintiff had questioned, and the decree of the court below dismissing plaintiff's bill and quieting defendant's title will be modified on appeal and limited to dismissal of the bill, plaintiff having failed to establish his right to recover under the allegations in his bill.

Appeal from Bay; Davis, J., presiding. Submitted June 5, 1918. (Docket No. 30.) Decided December 27, 1918.

Bill by Charles Marcoux against William Reardon and others for an accounting for the conversion of certain shares of corporate stock. From a decree for defendants, plaintiff appeals. Modified, and affirmed.

Kinnane, Black & Leibrand, for plaintiff.

W. E. Reardon, for defendant Reardon.

Gilbert W. Hand, for other defendants.

STEERE, J. Plaintiff and defendants were stockholders in a corporation known as the Farmers' Elevator Company, of Pinconning, Michigan, organized and incorporated under the laws of this State in July, 1911, with an authorized capitalization of $12,000. It was in its inception a local promotion by certain citizens of Pinconning and vicinity, optimistically inaugurated with a view to building a large elevator at Pinconning as headquarters and acquiring control of the business in that vicinity and adjacent points,

where it was proposed to establish small elevators, or buying stations called "scoopers." Its first activity was the exhaustion of its capital in construction of an elevator, at Pinconning village, which commenced doing business in October, 1911. A report of the condition for the year ending December 31, 1911, showed $12,000 capital stock subscribed and paid in, $11,000 cash and $1,000 property, and indebtedness $8,000. Of its assets to balance this, $14,198.76 consisted of "real estate including full equipment of elevator to date." In 1913 the capital stock was increased, and proceeds from sale of stock devoted to enlarging and improving the plant by an addition to the bean department more than doubling its capacity.

There was an elevator at Pinconning in active operation when this company was organized, which had capacity to handle the naturally tributary business of the village and proved an active competitor. The project to develop feeders for the company's elevator by organizing buying stations and building small elevators at surrounding towns and stations to control the larger territory did not materialize. With all its capital invested in a plant, the company borrowed money from the beginning with which to run its business. It obtained loans from banks in Pinconning, Saginaw and Detroit, secured by indorsements of defendants and plaintiff. Whether it at any time during its career was run at a profit is a matter in dispute. In the fall of 1915, its outstanding stock amounted to $25,300, its plant had cost over $25,000 and its indebtedness amounted to approximately $16,000, about $15,000 being bank paper upon which payment was urged. That the company was involved in debt and its financial condition a subject of solicitous discussion, particularly with defendants and plaintiff who were the principal stockholders and indorsers of its paper, is undisputed.

A stockholders' meeting was called on request of the requisite number of stockholders, including plaintiff, to meet on November 2, 1915. The purpose of such meeting, as stated in the notice to stockholders, being as follows:

—"taking action to relieve certain of the stockholders of said corporation from their personal liability of said corporation. It is the opinion of the officers and directors of said corporation that the only way in which the debts of the corporation can be paid will be by the sale of the property. You are hereby notified that this meeting is called for the purpose of taking such corporate action as may be necessary to dispose of and sell the property of said corporation, in order to pay its debts."

A meeting was held pursuant to notice, on November 2, 1915, at which 15 stockholders were present representing $22,060 of the capital stock. The record of that meeting shows that after it was called to order by the president and the notice stating its purpose read, free discussion was invited and several projects to relieve the situation were proposed and discussed. Amongst other things the record contains the following:

"Mr. Reardon and Mr. Naumes also stated that the persons individually liable for the debts of the corporation held more than 80% of the stock and that they were willing to enter into any arrangement to continue the business of said corporation whereby they would be relieved from their personal liability for the debts. Mr. Reardon, Mr. John Klumpp, Mr. Fred. Klumpp and Mr. Naumes and Mr. Charles Marcoux, each offered to surrender their stock without cost if they could be relieved from their liability on the notes."

Plaintiff does not deny the correctness of this record as to his making such offer, which is sustained by other witnesses, but says:

"I might have said it myself for all I know, but it

was simply a general discussion among the large body of men."

During that discussion Mr. G. C. Leibrand, who represented 50 shares of stock, after suggesting a receiver, further suggested the propriety of auditing the books of the company to determine how the losses had arisen, but on a motion that he be made chairman of a committee for that purpose declined to act on such committee and that subject was not pursued further.

After full discussion the following resolution was finally adopted:

"Whereas, the said Farmers' Elevator Company, a corporation, is largely in debt, with no money with which to pay the same, therefore be it—

"Resolved, that the property of said corporation, including all real and personal property of whatsoever nature, be conveyed to William Reardon, as trustee, to sell and dispose of same to pay the debts of said corporation, said debts amounting to $14,775.00, hereby authorizing said trustee to dispose of and sell said property for a sum to pay said debts or any amount in excess of same. Be it further—

"Resolved, that the officers of said corporation are hereby authorized and empowered to make, execute and deliver to said William Reardon, as trustee, proper conveyances to carry out the purpose of this resolution."

Of the 15 stockholders voting the recorded vote of members and shares shows, voting "yes": George Barie 60, Charles Bock 10, William Fleis 5, Gilbert W. Hand 1, F. W. Klumpp 400, J. C. Klumpp 270, V. B. Klumpp 155, E. H. Klumpp 120, Charles Marcoux 451, E. C. Marcoux 68, Martin Naumes 81, William Reardon 515, making 2,136 shares, of $21,360 par value; while G. C. Leibrand voted 50 shares and two other stockholders 10 shares each, total number of shares 70, par value $700, against the resolution.

On the same day, November 2, 1915, the following agreement was signed by the parties to this suit:

"PINCONNING, MICH., November 2, 1915.

"We, the undersigned, for and in consideration of the mutual promise to pay the sum of $500 by each of the undersigned, for the purpose of forming the initial capital for the organization of a new corporation to take over the assets of the Farmers' Elevator Company and pay the debts of the Farmers' Elevator Company, do hereby severally subscribe and agree to pay the sum of $500 to William Reardon, as trustee for the purposes above set forth, on or before .... days from the date hereof, all on condition and with the promise that said Farmers' Elevator Company take proper and necessary corporate action, conveying the assets of said Farmers' Elevator Company to said William Reardon, trustee.

"MARTIN NAUMES,
"WILLIAM REARDON,
"JOHN G. KLUMPP,
"CHARLES MARCOUX,
"FRED. H. KLUMPP,
"EDWARD H. KLUMPP,
"GEORGE BARIE,
"VAL B. KLUMPP."

The property was conveyed to Reardon as trustee pursuant to the resolution adopted at the stockholders' meeting and efforts were made by him to sell the same to various outside parties interested in the elevator business without success and he then tried to sell it by auction. Notice of a public sale to the highest bidder was advertised in the Bay City Times-Press, which had a circulation of from eight to ten thousand copies, and the property was offered at public sale at the time and place noticed, but no buyers appeared, nor were bids made except by Mr. Hand, the attorney for the company since its organization, who there stated he was bidding the property in for the eight men who signed the $500 agreement of November 2, 1915. It was struck off to him for the amount of the indebtedness, but he paid no money upon his bid and nothing was done to relieve the situation. Reardon

was unable to get any co-operation for financing the project under the agreement by the indorsers of November 2, 1915, or find a purchaser for the property who would pay more for it than the indebtedness, as he testified, and he finally negotiated a sale to Fred. W. Klumpp for $15,845.44, the full amount of the company's indebtedness, and the following paper was signed by defendants:

"November 26, 1915.

"In consideration of the assumption and payment of the debts in full of the above company, whereby the undersigned are relieved from all liabilities on the indorsements and obligations of said company, and fully understanding that Fred. W. Klumpp is the party who has advanced the necessary money to pay the said debts, and relieved the undersigned from liability as aforesaid, particularly hereby referring to those persons who are liable on said indorsements, we hereby waive any and all rights growing out of the foregoing writing, as the result of which William Reardon, trustee, on November 16, 1915, conveyed all the property of said company to Gilbert W. Hand, attorney for said above named parties, hereby authorizing William Reardon, as trustee, to execute and deliver the necessary instruments to convey said property to Fred. W. Klumpp, or any person that he may name, all subject to the agreements and obligations, whereby said Fred. W. Klumpp advances the necessary money to pay the debts of said company.

"In witness whereof the said parties before above named have hereunto subscribed their names for the purposes and intents herein set forth.

"MARTIN NAUMES,
"WILLIAM REARDON,
"FRED. W. KLUMP,
"VAL B. KLUMPP,
"GEORGE BARIE,
"JOHN G. KLUMPP,
"EDWARD H. KLUMPP."

Plaintiff refused to join with defendants in the execution of this instrument at a meeting to which he

was invited for that purpose, leaving to seek other counsel after some heated discussion and after an undiplomatic demonstration against him by the attorney for the company because of his declining to co-operate.

Acting as trustee under the resolution adopted at the stockholders' meeting of November 2, 1915, and the consent of all indorsers of the company's paper except plaintiff, Reardon transferred the property to Val B. Klumpp by direction of his father Fred. W. Klumpp, who paid to Reardon $15,845.44 in cash for the same. The money was thereupon put in the Pinconning bank to the latter's credit and he drew checks to that amount with which he paid all indebtedness of the Farmers' Elevator Company in full, receiving no compensation for his services as trustee in the proceeding.

Fred. Klumpp testified that he then offered plaintiff an interest in the property "half or more if he wanted it," and told Mr. Hand to write him. Hand wrote plaintiff, on November 27, 1915, reviewing the situation and claimed conditions which necessitated and justified the sale, stating that Fred. Klumpp was perfectly willing to have plaintiff go in with him if he desired to, and he could take on the same basis of cost a half, or a quarter, or an eighth interest in the investment. Of this plaintiff said:

"I would not go in that way. I wanted a controlling interest or none at all after the kind of a deal they were giving me."

When the resolution of November 2, 1915, was adopted authorizing Reardon to sell the property as trustee plaintiff owned 451 shares of stock in the company and his son Ezra 68, which they voted in favor of said resolution. He filed this bill of complaint, on July 22, 1916. In it he states that he has acquired by assignment his son's stock, 100 shares previously

belonging to Rev. Entrope Langlais and 50 shares from G. C. Leibrand, who appears as one of his attorneys in the suit, "with all the rights and equities arising out of the ownership of such stock and the conversion thereof," doing so "to avoid multiplicity of suits and to determine and dispose of the rights of said Langlais and Leibrand, together with your orator, in one action"; thereby representing 669 of the 2,530 shares of stock issued by said company.

The substance of his grievances as set out in his bill with detail of facts as he claims them is that he was misled and deceived by "misrepresentations which were made to him by defendants, and from statutory reports of the financial condition of the company and the reports made at meetings of the stockholders and directors of the condition of the company" and was by them "induced from time to time to subscribe for more of the company's stock in order that money might be procured for the purpose of enlarging and improving the elevator company's plant and adding new machinery"; that he relied upon such representations and believed the financial condition of the company was good until shortly before November 2, 1915, when he received notice from the secretary of a meeting to be held on that date "for the purpose of selling the elevator and all of its property to pay its indebtedness," and was about that time informed by defendants that the company was in bad straits financially and heavily indebted, for which reason it was necessary in order to continue the business "to form a new company which would take over the assets of the old company and which would make it necessary for the stockholders to put into the business about $500 each of ready cash to put the business again upon its feet"; and believing the representations made by defendants as to the bad financial condition of the company he signed the agreement of November 2d relative to a

new organization; that by various false representations and claims of emergency by defendants at the stockholders' meeting of that date the resolution authorizing a trustee sale prevailed; that he fully relied upon the promises of defendants that the proposed reorganization of the company would be carried out and offered to pay over the $500 "being his share of the proposed reorganization," and after waiting some time endeavored to find out the cause of delay, but defendants represented they knew nothing about the matter, until on November 26, 1915, he was called to Pinconning "to attend to matters in connection with the elevator company's business," which he supposed was to carry out the reorganization, when he first learned it had been abandoned and he was requested to sign the paper of that date authorizing sale of the plant to Fred. Klumpp for sufficient to pay the company's debts, which he protested against and refused to ratify,—

"but nevertheless said defendants conveyed and caused said property to be conveyed to Val B. Klumpp mentioned in the paper aforesaid, thereby finally absorbing and disposing of all of the assets of said corporation, and that they thereby converted the stock of your orator and that recently assigned to him by Father Langlais and G. C. Leibrand, and have appropriated the same to their own use. That said defendants are now in control of said elevator and property and are operating the same and that they have placed the title thereon in the name of Val B. Klumpp in trust for said defendants."

He further alleges that the property of the company was worth much more than represented by defendants, or the amount of indebtedness for which it was sold; that defendants fraudulently conspired together to and, by the course pursued, did in effect and fact deprive him and those he represents of their stock; and thus converted the same to their own use. The relief asked is for an accounting, an injunction and a de-

cree against defendants for the value of the stock so converted by them with a first lien for the amount decreed on the "property and real estate" of the company as described in the bill.

Defendants by their answers make denial of all wrong-doing charged, traverse the various allegations of plaintiff's bill in detail with their versions of transactions mentioned, allege that plaintiff was actively connected with the company as a director throughout its career, was conversant with and as a director participated in its general management and the things of which he now complains, except the final sale, was familiar with its financial embarrassment and with defendants became an indorser liable for its indebtedness, had offered his stock to any one who would relieve him of liability, as did defendants, and voted for the resolution authorizing a trustee's sale for sufficient to pay the indebtedness and release them; that none of the defendants have any interest whatever in the property sold, or former assets of the company, except Fred. Klumpp and his son, to whom it was sold and transferred by the trustee for the best procurable price, with which the indebtedness was liquidated; and denying any fraud, deceit, concealment or conversion, defendants ask dismissal of plaintiff's bill.

The case was heard upon testimony taken in open court, which went very fully into the history of this unfortunate business venture from the viewpoint and facts claimed by the respective sides. An advisory jury on the proposed issues of fact was at first called, but after listening to the evidence the court dispensed with its services and dismissed plaintiff's bill, saying in part:

"There was a resolution passed by a majority of the stockholders in number and amount and the plaintiff in this case was present at that meeting in which that resolution was passed, took part in it, entered

into the discussions, signed the agreement between the parties. If there was anything at all that was illegal in this matter or oppressive to the minority stockholders it was the feature of it that provided for the disposal of that property and re-organizing and putting it into the hands of the parties by the payment of $500. It was later sold without that requirement being carried out and entered into. There was no action taken by the plaintiff till he had been relieved of his liability as guarantor and indorser on paper of that company to the extent of several thousand dollars. The entire condition had changed, and it appears to the court that he is not in a position to come into this court at this time and complain; that he ought to be estopped from coming in. There was a time to provide for the best interests of all the stockholders, himself included, when the property was not being sold, on application to this court or it could have been disposed of any time as pointed out by the statute. He failed to do that. At that time the rights of all the parties could have been taken care of, and these several parties that rely on it, for these large amounts of paper of the company as indorsers and guarantors of the several banks. He had an opportunity not only to protect himself but the rights of the stockholders and he failed to take that step until he had been released and relieved of that large liability that stood against him, neither does it appear in this case by any proof that that property ought to or could have brought more under any circumstances or conditions that existed, and that being true it does not appear that even the assignors with their small claims put into the hands of Mr. Marcoux have met with loss and damage, and that being true I think in this case that the bill ought to be dismissed." * * *

Appellant's counsel say in their brief that the three controlling points in the case which the court erroneously decided adversely to their contention are as follows:

"1. Did plaintiff's stock have a substantial value?
"2. Was there a conversion of the stock?
"3. Is plaintiff estopped from maintaining this suit?"

The principal stockholders and promoters of this elevator company were also stockholders of the Citizens State Bank of Pinconning, of which plaintiff and certain of defendants were directors, Naumes being cashier and Val B. Klumpp assistant cashier. That the elevator then in Pinconning did its banking business with a rival bank is ascribed as one of the motives in this promotion. Plaintiff was a prosperous farmer of recognized responsibility in that community and became a subscriber for stock in the new elevator project at the proposal, as he states, of defendants Naumes, Barie and others, first subscribing for $1,000. He participated in the organization and was a director from the beginning. The directors of the Citizens State Bank and Farmers' Elevator Company were largely the same. Defendant Reardon, who was an experienced elevator man living at Midland and in a business of his own, was employed as manager under a written contract of August 1, 1911, at $1,000 a year. He at first subscribed for 100 shares of stock and took charge of erecting the plant. He became a director 19 months later and took more stock when emergencies for money arose until he held and had paid for $5,000 in stock when the property was sold. One thousand dollars salary was paid him for two years and two months, then reduced by his consent to $500 per year, which was paid him for three months, until April, 1914, after which he received no compensation for his services. He testified, and it is nowhere directly disputed, that when the organizers of the company engaged him it was understood he was not to look after the financing, but to furnish his knowledge and experience in constructing the plant, selling the product, directing the buying, etc., through hired help in direct charge; that he told them on the start it would take a good deal of money to carry out their project, and plaintiff spoke up and said, "we have got

the money. We intend to put in buying stations all around," and in the meeting when they organized "Mr. Naumes, Mr. Marcoux and Mr. Barie seemed to be the most enthusiastic men"; that he built just what they asked for, though too large for the local business, with a view to reach the open territory which could be made tributary; but they did not put up the money to establish stations at other points and the territory was taken up by competitors. None of the stockholders, except the indorsers and board of directors, increased their original subscription, the plant was not making any money, they were not reducing their liabilities, it was voted at a stockholders' meeting in August, 1915, to mortgage the plant for $15,000, which Naumes was to look after, but nothing came of it; he had secured a loan of $10,000 from a Saginaw bank for the company on the indorsement of himself and the other directors, which they had carried for a couple of years and was then being pressed; the company had no money to do business with, its credit was impaired, he and the other indorsers were unwilling to assume further liability and the action authorizing him to sell the property to pay debts was taken as related; that when Hand bid in the property at the public sale for the debts Naumes said he would look after the matter and the money would be forthcoming, but no money was paid in and he thereafter sold the property for enough to pay the debts, as he had been authorized to do, which was the best price he could obtain, and losing as a result of the sale $5,150 which he had paid for his stock, and, after completing his trust by paying all the company debts with the proceeds of the sale, had no interest in the property sold or its further disposition or use.

It is undisputed that this pretentious project to center the elevator business in Pinconning was unsuccessful and all stockholders lost the money they paid

for stock in the concern, including plaintiff and defendants, unless the latter by some secret combination and agreement fraudulently absorbed and acquired "all of the assets of said corporation" and thereby converted the stock of plaintiff, and all other stockholders not in the conspiracy, to their own use, and in the name of a dummy, or secret trustee, now control and operate the property of the elevator company for their own benefit as plaintiff alleges, and as to which the burden of proof rests upon him. His only claimed circumstantial proof to establish this is that the property was sold to one of defendants for less than it was worth, and not to all the eight parties to this suit, including himself, as was contemplated under the agreement of November 2, 1915.

The logic of his grievance as to the agreement of November 2d being abandoned would seem to be that it was a conversion to sell the property, for the amount of the company's debts, to the seven stockholders or to one of them for the use and benefit of himself and six others, but it would not be a conversion if all the eight stockholders who signed the agreement had bought it for the amount of the debts. He testified that he would not have voted at the stockholders' meeting as he did, authorizing Reardon as trustee to sell the property for the amount of the debts, "if it had not been for that previous agreement" and says that, after the property was bid in by Hand,—

"I went into the bank at Pinconning and asked Mr. Naumes what the reason was that the transaction didn't go through. He had lots of reasons, didn't have the money was one, and told me to see Fred. Klumpp, so I went to Fred. Klumpp's store and stated that to him. Mr. Klumpp and I went to the bank. We went into the back room, he and I and Mr. Naumes. Mr. Klumpp seemed to be very anxious to put the matter through and so was I";

It is undisputed that after Fred. Klumpp bought and paid for the property, so that defendant was released from all liability as an indorser, Klumpp offered him not only an eighth, which would be his interest had they "put the matter through," but a quarter or a half on the same basis of cost, which it is inferable he was financially able to take if he so desired, as he states: "I told Mr. Hand that I wouldn't go into that deal any more unless I would get the controlling stock in that elevator." It is also argued in plaintiff's brief that "the $500 agreement, Exhibit U, does not provide that the subscribers shall be favored over the other stockholders," but upon the trial his counsel said:

"We want the record to show that the $500 agreement was entered into by these parties for the purpose of restricting any open competition at the sale."

The claim and testimony of defendants as to this agreement is that the parties to it were all liable for a large amount as indorsers and it was signed with a view of protecting themselves by taking the plant for its debts provided they could not find a buyer who would pay the amount of the debts of the company for its property and relieve them of it. But, whatever was intended, it was a crude and imperfect instrument purporting to obligate the signers to pay $500 on or before an unstated time, for a purpose no one is designated or obligated to carry out, including payment of the company's debts amounting to nearly four times the total sum they were to pay Reardon as trustee. Failure of the signers to act under it, of which plaintiff complains, is not evidence either of fraud or conversion of the company's stock by defendants.

The record does not bear out plaintiff's claim that he was misled and deceived by defendants as to the

financial condition and business of the company. He was a director of the company, a regular attendant at their meetings, and an active participant in its affairs from the beginning. His son was employed by the company at his suggestion, first as its bookkeeper and later in local charge of the plant. He had access as a director to its books and records and special opportunity to keep in touch with its affairs, which as a director it was his right and duty to do. As a director in the bank where its banking was done he had further opportunity. In "a general discussion among the large body of men," who were stockholders, meeting to discuss the financial affairs of the company, he offered his stock without cost to any one who would relieve him from his indorsements for this company of which he was a director, and voted for a sale of the property at a price sufficient to produce that result.

Plaintiff strenuously argues that the trial court erroneously found it was not shown that the "property ought to or could have brought more under any circumstances or conditions that existed." Upon the question of value the conditions that existed were the important consideration. That the property was openly offered at public and private sale and no one was found who would pay more than it was sold for is undisputed. The testimony is at variance as to the value of the property at the time and place it was sold. That it was a large and good elevator, well adapted to the purpose for which it was built, and capable of handling a large business, if the business was available and the company financed to handle it, is conceded, but the testimony is convincing of the deterrent condition that both were wanting. The situation is well stated in the report of an insurance adjuster named Wardwell, introduced by plaintiff to show the cost and value of the property, made after examining the plant to determine a basis for fixing insurance.

Plaintiff's counsel state that the "great value of his report lies in the fact of its total impartiality." He estimates the cost of the building at $13,000, machinery and plumbing at $10,000, and other equipment at $1,200, from which he deducts five per cent. for depreciation, making the then (1914) cost value $24,000, but in discussing surrounding conditions and the affairs of the company he states: "The investment here is double what the business warrants, and good money has been thrown after bad," which is in substance the reason given by other experienced elevator men called by defendants for their opinions, that the property was sold for all, or more, than it was worth. We do not disagree with the conclusion of the trial court that plaintiff has failed to establish the contrary by a preponderance of evidence.

It is fairly shown that this corporation had proved unprofitable, was in a failing condition, had no money to pay its maturing debts and was without credit to renew the same or obtain means to conduct its business, unless defendants or other acceptable stockholders became personally responsible. Previous indorsers for its indebtedness to a large amount, who were not only its directors but most interested in its successful continuance if possible, refused to assume further liability, and at different times offered their stock gratis to be relieved of liability; doing so at the meeting of stockholders called to consider the financial condition of the company with no one indicating any inclination to accept the offer. That meeting authorized, by a large majority of members and amount of stock, what is now complained of.

It is true that our statute authorizes a method for winding up the affairs of a corporation when in failing condition by appointment of a receiver and it is argued that the course pursued here was irregular and unauthorized. While the statutory method would

be more regular and apparently the wiser course in case of an objecting stockholder, the statute does not make unlawful other methods taken by authority of the majority where all have equal opportunities to purchase the stock of others, or assets of the corporation at public or private sale; neither does plaintiff ask that the course taken here be annulled and a receiver appointed. His counsel say in their brief:

"It is not sought by this suit to recover the property or to set aside the sale, but merely to recover the value of the stock."

"The right of the majority stockholders of a corporation established for manufacturing or trading purposes to wind up its affairs, and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized. *Treadwell* v. *Manufacturing Co.*, 7 Gray (Mass.), 393; *Wilson* v. *Proprietors*, 9 R. I. 590; *Lauman* v. *Railroad Co.*, 30 Pa. St. 42." *Hayden* v. *Directory Co.*, 42 Fed. 875.

The general rule is stated as follows in 10 Cyc. p. 1302:

"In corporations organized for business purposes and for the private gain of their members, the principle of the rule of the majority obtains to the extent that if the majority conclude that the business cannot be carried on with profit or advantage to all, they may, against the will of the minority, elect to wind it up. So if. in the exercise of a sound discretion, a majority of the stockholders deem it expedient to do so, they may sell out the whole property of the corporation."

To discontinue a failing business and proceed to sell the property and pay the debts is not a breach of trust. *Rothwell* v. *Robinson*, 44 Minn. 538 (47 N. W. 255).

"If, however, the corporation is an unprofitable and failing enterprise, then a sale of all corporate property with a view to dissolution may be made." 2 Cook on Corporations (6th Ed.), § 670.

Amongst the numerous cases cited to sustain this general proposition appears *Doyle* v. *Leitelt*, 97 Mich. 298.

The case of *Thoman* v. *Mills*, 159 Mich. 402, is somewhat analogous to this in the particular that defendants also took what the trial court termed a "short cut to the inevitable result" and did not approve that course, but, finding that the sale was made in good faith and the result would have been the same if legal formalities had been observed, awarded only nominal damages. In the controlling opinion approving the result and affirming the decree this court said:

"It is not believed a case can be found where relief was granted to a stockholder in a prior corporation which was sold to a later corporation under the circumstances disclosed by this record."

That case, however, differs from this in various material particulars. There the assets of a prior corporation were sold to a later corporation in which defendants were interested; complainants did not vote in favor of the sale at the stockholders' meeting authorizing it, nor was the property offered at public sale, or equal opportunity given to them and other stockholders to purchase.

At conclusion of the hearing, after intimation from the court that the bill should be dismissed, defendants' counsel moved the court that the corporation be made a party plaintiff, and defendant Val B. Klumpp have permission to file an amended answer asking for confirmation of his title to the property, which was objected to by counsel for the plaintiff, and the court intimated that course would be permitted, an order of that kind would be made and a decree to that effect granted. We find no record of any order making the corporation a party to the suit, bill of complaint by it or amended answer as proposed, but the decree dis-

missing plaintiff's bill also contains a provision quieting the title of defendant Val B. Klumpp to the real and personal property conveyed to him by Reardon as trustee with costs to defendants. In behalf of plaintiff the latter portion of the decree is strenuously objected to as not warranted by any pleading or issue in the case, and it is insisted that at least nominal damages should be awarded to him with costs, or if the bill is dismissed it should be without costs in view of the course pursued by defendants.

It is charged as one of the grievances in plaintiff's bill that for the purpose of completing the conversion of his stock in the corporation defendants filed with the secretary of State, on December 18, 1915, a notice of dissolution of said corporation effected by sale of all its property, corporate rights and franchises. Defendants admit this in their answer, but deny that it was done for the purpose of converting plaintiff's stock, alleging that it was in the interest of plaintiff and all other stockholders. While defendants could not technically dissolve the corporation by such proceeding, neither they nor the corporation as such are in an equitable position to insist upon its being made an active participant as plaintiff in this suit, and then in behalf of one of defendants ask to amend his answer by adding a cross-bill for the purpose of quieting his title under a conveyance it gave through a trustee which neither the corporation nor plaintiff has questioned, the theory and purpose of this suit being to recover from defendants the value of plaintiff's converted stock, not to set aside or attack the sale as such nor recover the property sold.

We agree with the conclusion of the trial court that plaintiff has failed to establish his right to recover under the allegations in his bill, which should be dismissed, but find nothing under the circumstances dis-

closed in this case to move the conscience of a court of equity upon either side.

The decree of the lower court should be limited to dismissing plaintiff's bill, and so modified will stand affirmed without costs to either party.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

McKEE v. CITY OF GRAND RAPIDS.

1. TAXATION—MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—PUBLIC IMPROVEMENTS—SEWERS.

   Where the common council of the city of Grand Rapids complied with the requirements of its charter and the provisions of the several special acts authorizing the building of a trunk sewer, and the erection of a flood wall, each improvement being paid for out of funds as provided in said special acts, there is no merit in the contention that there was a prohibited double improvement under a single assessment, although to save expense both improvements were carried along at the same time, by the same contractor, and under the same contract.

2. SAME—DOUBLE IMPROVEMENTS—IRREGULARITIES—ESTOPPEL.

   If there was any irregularity in this particular, plaintiffs are estopped from raising it by their conduct in standing by and seeing these public improvements going on without legal protest, and in failing to mention it in their appeal from the board of assessors to the common council under the charter provision requiring the grounds of appeal and matters complained of to be stated in writing.

3. SAME—ASSESSMENT DISTRICTS—DISCRETION OF OFFICERS—CONCLUSIVENESS—MISTAKE—FRAUD.

   The determination of municipal officers, in whom discretion

is vested to decide upon assessment districts and levies of assessments, is conclusive in the absence of mistake or abuse of discretion amounting to fraud.

4. SAME—GRAND RAPIDS CHARTER—REVIEW—EQUITY.
Under the charter of the city of Grand Rapids (Act No. 593, tit. 6, § 45, Local Acts 1905), any mistake or fraud in such proceedings may be reviewed in chancery and corrected where clearly shown.

5. SAME—SPECIAL TAXES—MISTAKE—FRAUD.
In an action by landowners to restrain the city of Grand Rapids from collecting certain special taxes levied upon plaintiffs' lands in said city, evidence *held*, to sustain the conclusion of the court below that there was such a palpable discrimination against plaintiffs and an unequal assessment relatively so out of proportion to benefits as to amount to a legal fraud, entitling them to a correction of such error on "equitable principles" as provided in defendant's charter.

6. SAME—CORRECTION OF MISTAKE—TENDER—EQUITY.
Where plaintiffs, before commencement of suit, tendered the city a certain sum, which was in excess of the amount fixed in the decree of the court below, and in their verified bill said upon oath that the amount so tendered was fair, just, and equitable for possible benefits in such improvements, this court, in correcting the error on "equitable principles" will modify the decree of the court below to correspond with the amount tendered.

Appeal from superior court of Grand Rapids; Dunham, J. Submitted June 6, 1918. (Docket No. 45.) Decided December 27, 1918.

Bill by James L. McKee and others against the city of Grand Rapids and another to enjoin the collection of special assessments. From a decree for plaintiffs, defendants appeal. Modified, and affirmed.

Elvert M. Davis and *Earl F. Phelps*, for plaintiffs.

Ganson Taggart, City Attorney, and *Charles A. Watt*, Deputy City Attorney, for defendants.

STEERE, J. Plaintiffs' bill seeks to restrain collection of certain special taxes levied upon their lands for a local improvement in the city of Grand Rapids called the "East Side Trunk Sewer." When suit was begun the sewer had been constructed, the special tax assessed and the tax roll for the assessment district in the hands of the city treasurer who was about to proceed with enforcement of payment by a tax sale of plaintiffs' land delinquent for the special taxes assessed thereupon. After answer and replication the case was duly heard on pleadings and proofs taken in open court. Although certain technical objections were made to the tax proceedings involved, plaintiffs' most serious and insistently stressed objection to the taxes against their property was, as stated in their bill, that they are—

"grossly disproportionate to the benefits that have accrued or will accrue to the said property from the construction of the said sewer, and for the reason that the said assessments against the property of your respective orators are inequitable, unfair, excessive and discriminatory, and for the reason that the said assessment is arbitrary and is not applied with compliance to any uniform rule in the said assessment district and is not assessed by any tangible process of equal and fair distribution of benefit."

A volume of evidence, mostly documentary, was introduced showing the various official proceedings, steps taken and things done pursuant to them resulting in the construction of the sewer, and levy of this tax, and also a flood wall along the river at the same time. The issue to which the oral testimony was largely devoted was whether the taxes in question were so excessive, unfair and discriminatory in fact as to call for equitable intervention by the chancery court. The trial court so held, and, presumptively acting under authority of the city charter, made a re-

taxation or reduction of the taxes complained of, finding and decreeing in part as follows:

—"that the lands described in complainants' bill of complaint herein * * * and assessed for benefits by the board of assessors of the city of Grand Rapids upon the assessment roll for the construction of the 'East Side Trunk Sewer,' so-called, at $2,515, is excessive, inequitable and unjust in causing the complainants to pay towards such improvement a sum greatly in excess of the benefits received thereby, and that such assessment was a grave and gross mistake by said board of assessors, and is fraudulent and unjust as against said complainants, and should be decreased from $2,515 to $454. * * *

"It is therefore ordered, adjudged and decreed by the court now here, that the assessment upon complainants' property described in their bill of complaint, for the 'East Side Trunk Sewer,' so-called, for the sum of $2,515, be set aside as a void assessment, except as to the sum of $454, which shall be in full against said land and against said complainants for such improvement."

From this decree the city has appealed, contending that no ground is shown for equitable interference to disturb the judgment of the board of assessors provided by law to determine and decide, and that in any event the reduction made is grossly excessive, the tax imposed by the court being much less than that plaintiffs admitted would be a just and equitable assessment.

The three objections made against this special assessment by plaintiffs and argued in counsels' briefs are, that the same is excessive, not in proportion to benefits, unequal and oppressive, as before mentioned; that it involved a single assessment for a double improvement, and that the advertisement of plaintiffs' land for sale as delinquent did not comply with charter requirements.

Of the last objection it need only be noted in passing that defendant admits a technical failure to fully

comply with the charter in the respect pointed out, and that in any event the preliminary injunction granted at commencement of the suit halted further proceedings and rendered the taken steps to advertise the tax sale of this land on a specified date nugatory, so that re-advertisement would be a prerequisite to a valid sale of plaintiffs' land for the delinquent special taxes assessed against it.

Plaintiffs' contention that there was a prohibited double improvement under a single assessment is based upon the fact that a flood protection, or dock-line wall, was built along the east side of the Grand river at the same time the East Side Trunk Sewer which ran along the river just back of it was built and the work was done by the same contractor under a contract with the city which included both operations. This plaintiffs urge is forbidden by previous rulings of this court in *Clay* v. *City of Grand Rapids*, 60 Mich. 451, and *Peck* v. *City of Grand Rapids*, 125 Mich. 416.

Grand Rapids lies on both sides of the Grand river which flows southerly and centrally through it in a locality where the irregularities of the topography and recurring high stages of the river cause unusual difficulties and expense in providing for the more or less related necessities of surface drainage, sewage and flood protection. In addition to the power conferred by the city charter under which various improvements of that nature were made by the municipal authorities from time to time, special legislation was secured authorizing heavy bonding, when ratified by a plebiscite, for expenditures to relieve the situation by construction of large trunk sewers on both sides of the river and flood walls or dykes along it.

In 1905 the legislature passed a local act (Act No. 668) authorizing conversion of the so-called West Side Big Ditch in the city of Grand Rapids into a sewer,

its improvement and extension, authorizing the city to borrow not to exceed $120,000 by bonding for said purpose in anticipation of a levy and assessment of taxes to meet the same.

In 1907 a local act (Act No. 643) was passed authorizing the city to borrow $300,000 for the purpose of "establishing and constructing trunk sewer or sewers upon either side of Grand river, from or near the south city limits of said city, so far up the river or along or near either bank thereof, as may be found necessary by the common council of the city of Grand Rapids, in anticipation of the collection of assessments and taxes to defray the expenses and cost thereof," etc. Each of these local acts in regard to sewers authorizes the designation of benefited districts for special assessment and taxation in accordance with the methods provided in the city charter.

In 1907 a local act was passed by the legislature (Act No. 413), entitled:

"An act to authorize the sale of bonds by the city of Grand Rapids, Michigan, to meet the cost of flood protection of said city from the waters of Grand river and streams tributary thereto, including moneys heretofore used therefor."

This act authorized the issuing of $1,000,000 of bonds for such purpose, if approved by a popular vote, directing that the proceeds of the sale of such bonds, or such portion thereof as was found necessary, should be used—

—"exclusively for the protection from floods of Grand river and streams tributary thereto within the limits of said city by dykes or walls or both, or otherwise, and the scaling of the river bed within the city limits, or for such other method of protecting the public from their floods or unsanitary conditions as may be decided by a two-thirds vote of the common council; also their proceeds may be used to reimburse the city for moneys used since January 1, 1906, for flood protection on Indian Mill creek and Grand river."

Bonds issued for this purpose were to be "executed and certified in the same manner as bonds issued under said city charter for public improvements other than street improvement or sewer construction bonds," which under the charter are met by a general tax imposed therefor upon the whole city.

Under the provisions of those special acts and the city charter the common council took the requisite preliminary action necessary to authorize the needed improvements and the city proceeded with the work in accordance with approved and adopted plans, by scaling the river, building flood or dock walls along it and, more directly involved here, constructing a trunk sewer down the east side of it, picking up the openings or outlets of other sewers which emptied into the river, so as to carry their flow down stream to the pumping station at or near the city limits, and thereby both relieve the river from them within the city limits, and facilitate the discharge of the sewers which high water in the river at times obstructed. Proceedings were taken to authorize and provide payment for the flood wall under the local act upon that subject, entirely independent of the sewer proposition. Its location was necessarily at the river margin without regard to where the sewers ran. Under other appropriate legislation the common council determined the east side trunk sewer was a necessary public improvement and made provision for its construction. When the question of its exact location was under consideration it was suggested by the engineer's force of the board of public works, which had control of the improvement, that a great saving could be made by locating the sewer for a part of the distance closer to the flood wall and having the two improvements carried on contemporaneously or in combination, each to be paid for out of its separate fund.

Estimates for each, reports and resolutions were

had to this end and the work was carried on in one operation as proposed at a total cost of $370,675. The cost of the flood wall as computed (and so determined by resolution of the common council) amounted to $81,900. This was paid from the flood fund by direction of the council. The cost of constructing the east side trunk sewer, found to be $288,775, was by proper official action assessed pursuant to the provisions of Act No. 643, Local Acts of 1907, and the city charter. There was but a single assessment for that single improvement; the cost of the flood wall did not enter into it. It is not a case of doing one thing and calling it something else. There was no special district designated or special assessment spread for the wall, which was separately provided for by bonds under a different law, to be eventually paid by the city at large. There was no misnomer, misapprehension or deception in providing for and carrying on one public improvement in the guise of and under a provision of law applicable to another, as in the cases cited by plaintiffs; no confusion as to districts benefited could arise, one improvement being paid for by the entire city and the other by a district fixed by the council. The inhabitants of the city had opportunity to be heard on each of these public improvements, which were separately provided for and neither included in the other.

But conceding a technical irregularity in that particular, plaintiffs stood by and saw these public improvements going on and completed at heavy expense to the city without legal protest or objection. It was a pretentious undertaking of general interest, entered upon and carried out after long preparation and public discussion. The property involved here was low land near the river and necessarily within the assessment district; some of plaintiffs had sold to the city from other land not far distant the right of way for these

improvements, receiving $5,500 therefor, exaction of which is suggested as influencing official action in imposing the tax complained of. Plaintiffs appealed from the board of assessors to the common council, as authorized by the city charter which required the grounds of appeal and matters complained of to be in writing, without mentioning this objection. Failure to make timely and legal objection after knowledge and opportunity estops them from later contesting the tax on such ground. *Moore* v. *McIntyre,* 110 Mich. 237; *Auditor General* v. *Bishop,* 161 Mich. 117.

The property of plaintiffs upon which the taxes complained of are assessed is vacant, said to consist of about 3 1/3 acres, and lies along the west side of Market street north of Wealthy avenue in the southerly portion of the city, from a half to three-fourths of a mile below its business center, near and on the east side of Grand river in a location which plaintiffs' counsel designates as a factory district. It has sidetrack facilities at the rear, and, as Mr. McKee testified, is suitable for houses, light manufacturing, coal yards and, he expected or hoped, would be available for wholesale business. It is platted into lots fronting on Market street, which is a graded, paved and sewered thoroughfare. On the west, at its rear, it joins a tract of land belonging to the city, known as the Market property, consisting of about 20 acres which fronts along the river, and has upon it a city market, lighting station, baseball park, garbage burner, dog pound and other buildings. Most of the city market property was formerly an island in the river with a channel to the east, covering what is now a portion of plaintiffs' property, deep enough to be navigable by steamboats then in use, but which in the progress of improvements was filled in and the river confined to the west channel. Litigation over the subject terminated in what is called a "compromise line" running along the

bed of the old east channel and dividing it between the city, which owned the island, and the shore owners whereby plaintiffs' lots acquired 48 feet additional depth on the west end. The lands in that locality along the river were naturally low, just how low relatively, how much affected by the condition of the river, and how much different descriptions had been filled in, or raised, was a fruitful topic of more or less conflicting testimony. Plaintiffs' land and the city market had been raised by filling to practically a level with Market street, as had other descriptions in that vicinity, while others had not. The market property was taxed for this sewer, which passed through it, at $2,724.

It is accepted as a general rule that the determination of municipal officers in whom discretion is vested to decide upon assessment districts and levies of assessments should be treated as conclusive in the absence of mistake or abuse of discretion amounting to fraud. That mistake or fraud in such proceedings which prejudices the property rights of the person whose property is taxed may be reviewed in chancery and corrected where clearly shown is recognized in defendant's charter as follows:

"No mistake or error in the proceedings in regard to the opening or improvement of streets, avenues, public ways or alleys or in the construction of sewers, or in the assessment or collection of costs or expenses thereof, or in the proceedings for the assessment or collection of municipal taxes in said city, or any irregularity in any special or city tax roll by reason of the proceeding therefor not being had within the time required by law, or the property having been assessed to the wrong owner, or any irregularity, informality or omission or want of any matter of form or substance in the proceedings that does not prejudice the property rights of the person whose property is taxed, shall defeat the city in the collection thereof; but any such errors may be corrected on equity prin-

ciples under the direction of the common council of the city, if discovered before suit is brought thereon or by the court after suit is instituted, and the equitable amount due the city may be enforced as though no such error had occurred." Title 6, § 45, Act No. 593, Local Acts 1905.

To sustain the charge of fraudulent assessment which prejudiced their property rights, plaintiffs amongst other things introduced testimony tending to show that in the so-called "flood district" and within the vicinity of their land certain surrounding property in many respects similarly situated was assessed so low in comparison with theirs as to indicate an abuse of discretion amounting to fraud. Summarized from this comparative proof in relation to surrounding descriptions it appeared that, computed on both a basis of front foot and square foot assessment, plaintiffs' property was assessed $2.50 per front foot and 17 mills per square foot, while land bounding it on the west was assessed 60 cents per front foot and 1 to 3.2 mills per square foot; on the north 44 to 60 cents per front foot and 1 to 3.2 mills per square foot; on the east across the street 58 to 90 cents per front foot and 1 to 7 mills per square foot; upon the south 25 cents to $1.15 per front foot and 2.2 to 2.6 mills per square foot. Without going through the testimony in full detail, for better understanding of their comparative value the following is fairly illustrative: The city market property consisted of 20 acres with various buildings upon it. It was practically upon the same level and adjoined plaintiffs' land on the west. While not fronting upon any street, it fronted on the river and had a public approach from Market street. It received direct benefit of this sewer, which ran through it but did not touch plaintiffs' which was upon a sewered street for which a special sewer tax had been imposed and paid by plaintiffs. This property was

assessed at 60 cents per front foot and 3.2 mills per square foot. A piece of land called the Godfrey property, just east of and mostly lower than plaintiffs', was assessed at 82 cents per front foot and 7 mills per square foot. Four lots directly across Market street from the center of plaintiffs' property and over four feet lower, were assessed 90 cents per front foot and 7 mills per square foot. Two lots directly across Market street at the south end of plaintiffs' property, and much lower, but occupied by three dwelling houses, were taxed 58 cents per front foot and 11 mills per square foot. A piece of land called the Kent parcel, lying across Market street east of the north end of plaintiffs' land and running north one block, in the flood district but some higher than plaintiffs', was assessed 44 cents per front foot and one mill per square foot. A piece of property of 3 1/3 acres belonging to the gas company, several feet lower than plaintiffs', situated about 150 feet south of it and across Market street, upon which was a gas plant, was assessed at $1.15 per front foot and 2.5 mills per square foot. Land occupied by the street railway power plant, lying just south of the gas company property, was assessed at $1.09 per front foot and 2.7 mills per square foot. A piece of property belonging to the Manufacturers' Realty Company, upon which was a box factory, lying across Market street and some distance southwest of plaintiffs' property but in the same flood district and much lower, was assessed 70 cents per front foot and 2.4 mills per square foot. To the extent these lands are shown to be lower than plaintiffs' and more subject to be flooded, they would appear to receive greater benefit from the improvement. There was also some property across Wealthy avenue and southwest of plaintiffs' land, much lower and in the flood district, upon which under an agreement relative to right of way the city had contracted to pay

all of this special assessment in excess of $250. There was no excess. It was assessed 28 cents per front foot and 2.3 mills per square foot, the total being $246. The mathematical accuracy of these figures fairly appears. Their significance is a matter of controversy.

The proof as to area, elevation above the river and various assessments and comparative computations show that relatively plaintiffs' land was assessed about four times lands near it in the flood district on the west, five times as much as the lands shown on the north, five times as much on the east and from three to ten times as much on the south, with no proof of greater benefits to account for such marked discrepancy.

The record well sustains the conclusion of the trial judge that the evidence shows a palpable discrimination against plaintiffs and unequal assessment relatively so out of proportion to benefits which are proven or can be found from the testimony as to be in legal effect a fraudulent assessment, or abuse of discretion, or at best a material mistake prejudicial to plaintiffs' property rights entitling them to a correction of such error on "equitable principles," as provided in defendant's charter.

It is not, however, necessary to accept as proven plaintiffs' direct charges of intentional fraud or personal purpose to produce such result on the part of the assessing officers. The assessment of this large district with several thousand descriptions of land, of varying kinds, shapes and conditions, benefited in varying degrees according to location and elevation, was a formidable undertaking in which occasional misapprehension and mistakes on the part of the assessors were likely to occur. A few extracts from their testimony illustrate this. One of them interrogated as to a certain description answered as follows:

"*Q.* Do you know that you assessed the street railway company at 2.6 mills and McKees' (plaintiffs') at 17 mills per square foot per area?

"*A.* Who did that figuring?

"*Q.* If those are the figures, it would be a just assessment, would it?

"*A.* No. * * * We intended to assess the lower land that was more liable to flood for greater benefits than the land that was higher and less liable to flood."

Asked about the gas company's land which the testimony shows was several feet lower than plaintiffs' he said:

"It lies a little higher than McKees'. I so considered it at the time we made the assessment and do now."

When asked about a tract of land directly across Market street east of plaintiffs', shown by the testimony to have been in the flood district and over four feet lower, he said:

"That was benefited less than McKees'. Quite a bit less. It is on the east side of Market avenue where it is high and dry, good land."

Another assessor, asked about a piece of land in the flood district called the Wagemaker property and shown to be much lower than the plaintiffs,' testified:

"I should say that the Wagemaker property was better located at that time. It was higher. It was not flat land. * * * In my judgment, at this time, the Wakemaker property would be about equally benefited with McKees' property north of Wealthy. * * * I don't know as I can give you any other reason why we assessed McKees' property north of Wealthy at 11 or 12 times as much as we did the Wagemaker property. * * * I have stated that McKees' land south of Wealthy had a higher elevation than the McKee land north of Wealthy. That is the way we understood it at the time we made the assessment."

The property involved in this suit and much of that with which it is compared lies north of Wealthy ave-

nue. This assessor said of their method of assessment, "North of Wealthy we had another territory or district and we figured that per square foot." Plaintiffs' 3 1/3 acres was assessed at $2,515, and the adjoining market property of about 20 acres at $2,724. One assessor, when asked how they arrived at $2,724 for the market property, answered, "You have got me guessing; I don't remember."

The trial court apparently concluded plaintiffs' property should be assessed no more per acre than the market property, and reduced the assessment to $454. Defendants urge various distinctions in the two properties other than acreage and press reasons against so radical a reduction, including admissions in pleading and estoppel by tender.

Before commencement of this suit plaintiffs tendered the city $1,355.28 in full payment of their various assessments in controversy amounting to $2,515. This tender was made by plaintiff J. L. McKee, one of the owners, who was authorized to represent his coplaintiffs. He is an attorney and had charge of the transaction. He was familiar with the subject and showed by his testimony a comprehensive knowledge of the property in that locality, its relative values, and the uses to which it was adapted, had evidently studied and compared these assessments, etc., and was experienced in such matters. In plaintiffs' verified bill they all say upon their oaths that the "amount so tendered by the said McKee was considered by said plaintiffs at the time he made such tender to be a fair, just and equitable amount that should be assessed upon said property for any possible benefits derived from said east side trunk sewer."

It is true the money was not deposited in court, nor is any formal withdrawal of the tender shown, and while not operating technically to preclude plaintiffs from asserting in suit their various defenses against

the assessment complained of, it is a persuasive consideration in determining "the equitable amount due the city" under the assessment. It is stated as a general principle that:

"A tender is ordinarily an admission of an amount due equal to the sum tendered even though the tender is insufficient in form, or is made in a case where a valid legal tender cannot be made; and it dispenses with proof of everything that would otherwise be necessary to enable plaintiff to recover * * * to the extent of the sum admitted to be due." 38 Cyc. p. 163. Citing numerous cases.

Upon this record as a whole, and with due regard to the evidence bearing upon actual benefits conferred, as well as plaintiffs' tender and their views expressed under oath in their bill that the amount was fair, just and equitable for possible benefits from such improvements, we conclude that in correction of the error on equitable principles the decree should be modified in amount to correspond with the amount tendered. So modified it will stand affirmed, without costs to either party.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

MOREHEAD MANFG. CO. v. ALASKA REFRIGERATOR CO.

1. CONTRACTS—WARRANTY — DISSATISFACTION — CAUSE FOR REJECTION—RULE.

Where the subject-matter of a contract involves a question of individual taste or sentiment rather than of utility, the good faith of the party declaring his dissatisfaction cannot be inquired into; but where the subject-matter of the contract relates to a thing which is ordinarily desirable only because of its commercial value or of its mechanical fitness, it is held that the party must act in good faith and must be honestly dissatisfied.

2. SAME—QUESTION FOR JURY.

In an action by plaintiff on a written contract for certain material furnished for installation in defendant's factory, guaranteeing that the system sold will "handle all of our exhaust steam and all of our live steam that we use for heating purposes throughout the dry kilns and entire plant, * * * making a saving of 5 per cent. in fuel daytimes and 20 per cent. increase of heat in daytimes on the fans, * * * reduce the back pressure on the engine one-third," and agreeing that if the equipment does not do the work as guaranteed plaintiff will remove the same without expense to defendant, on conflicting testimony the question of whether defendant arbitrarily and in bad faith asserted dissatisfaction and refused to accept and pay for the equipment which in fact came up to the guaranty, because through information furnished by plaintiff's agent defendant could get the desired results without it, was a proper question for the jury.

3. SAME—EVIDENCE—ADMISSIBILITY.

The court below was not in error in excluding a book containing a record of temperatures taken two years before, where no record was kept for the intervening period, nor any evidence offered that the condition and equipment of the plant was then the same as when the contract was entered into.

4. SAME—WARRANTY—TRIAL—INSTRUCTIONS.

An instruction by the court that the guaranty to "give 20 per cent. increase heat daytimes on the fans," meant not

the temperature in the kilns, as defendant contended, but at the mouth of the tube or fans, *held*, not erroneous, since the sentence of simple words required no interpretation or evidence to determine its meaning.

5. SAME—ADMISSIONS—EVIDENCE—TRIAL—INSTRUCTIONS.

A letter signed by defendant's assistant manager, stating that certain instructions as to changes to be made had been given to defendant's engineer, and that the traps were then working O. K., keeping the system drained dry, was competent testimony for its bearing upon the issue, and upon defendant's claim that it was obtained by subterfuge, that it was signed at the request of plaintiff's agent without knowing its contents, and that defendant's engineer had no knowledge of the letter, and never received any such instructions referred to, its weight was for the jury, and it was error for the court, in his instructions, to discuss said letter argumentatively, indicating his opinion as to its effect.

6. SAME.

Where the testimony as to whether the warranty as to reduction of back pressure had been fulfilled was conflicting, it was a question for the jury, and it was error for the court to discuss said question argumentatively, practically taking it from the jury.

Error to Muskegon; Sullivan, J. Submitted June 13, 1918. (Docket No. 88.) Decided December 27, 1918.

Assumpsit by the Morehead Manufacturing Company against the Alaska Refrigerator Company for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Reversed.

Cross, Foote & Sessions, for appellant.

Hatch, McAllister & Raymond and *Willard J. Turner*, for appellee.

STEERE, J. Plaintiff is a corporation located in Detroit, Michigan, engaged in the manufacture of specialties for drainage of steam apparatus used for heat-

ing, evaporation, power purposes, etc., and issued a catalogue of its products in which was advertised what is called the "Morehead Trap" or "Morehead System" manufactured for that purpose. Defendant is a corporation located at Muskegon Heights, Michigan, engaged in the manufacture of refrigerators. In 1911, its plant was heated by exhaust steam which after performing its purpose in the engine was utilized to heat the feed water for its boilers and passed through heating coils into its dry kilns for curing or drying lumber.

Defendant's engineer, Thomas Pedler, had requested and received a catalogue from plaintiff, which was accompanied by a letter stating that its agent, Mr. Crowley, would call upon defendant in reference to the matter if desired, to which defendant replied it would be agreeable for him to call. Crowley was an engineer particularly experienced in matters relating to drainage of steam-heating apparatus, and under directions from plaintiff visited defendant's plant as soon as engagements permitted. As a result of their negotiations defendant sent plaintiff the following signed order:

"THE ALASKA REFRIGERATOR COMPANY,
"MUSKEGON, MICHIGAN, 10/16/11.
"To THE MOREHEAD MANUFACTURING COMPANY,
"Detroit, Michigan.
"Order No. 9865.

"Please ship us promptly to Muskegon, Michigan. via.....the following goods:

"Please enter our order for
"1 No. 5 Condenser
"1 No. 5 Return Trap
"1 No. 1 Return Trap
"1 No. 1 Receiver
"Price $775 f. o. b. Muskegon, Michigan.
"Your representative, Mr. Crowley, guarantees that this equipment mentioned above will handle all of our

exhaust steam that we use for heating purposes throughout the dry kilns and the entire plant.

"He guarantees to make a saving of 5 per cent. in fuel day times and 20 per cent. increase in heat day times on the fans.

"Night times, holidays, and Sundays he claims a saving of at least 20 per cent. in fuel and 20 per cent. increase in the heat on the fans. He also agrees to reduce the back pressure on the engine one-third.

"The temperature of No. 3 and No. 4 kilns varies from 110° to 115° at the kiln; the temperature of No. 1 and No. 2 kilns is 140° to 150° at the kiln.

"This complete equipment is to be furnished subject to 60 days' trial and subject to our approval, as per the guarantee above.

"Mr. Crowley agrees that if this does not do the work as he guarantees it, to remove the equipment without any expense to the Alaska."

To which plaintiff responded on October 18th as follows:

"THE ALASKA REFRIGERATOR COMPANY,
"Muskegon, Michigan.

"*Gentlemen:* Your order No. 9865 at hand and contents noted. The same will receive our very prompt attention. We note guarantees which have been inserted in this order and wish to congratulate your secretary on the same. We don't think that he overlooked anything.

"We at the same time beg to advise you that Mr. Crowley is a man who has had lots of experience in this line and knows the goods thoroughly, and knows how to install them, and knows what to do, and we cheerfully accept the conditions laid down by him, and we don't doubt for a moment but he can do just what he says he can do."

On October 20th defendant sent plaintiff the following supplemental order:

"Order No. 6543.

"Please ship us promptly to Muskegon, Michigan, by freight the following goods:

"4—3" Brass Rouse check valves

"2—1" Brass Rouse check valves

"Same as you recommended for our use.

"Mr. Pedler stated that you suggested buying these for us as you might be able to save us $2.00, or thereabouts, on a valve. We understand that these valves are necessary in installing your equipment, so kindly plan to order these for us, if that is the case, so they will be here when the other material arrives."

This equipment was shipped on October 27, 1911, put into its plant by defendant, which was to make its own installation according to catalogue directions and instructions which Mr. Crowley had given when negotiating the sale while at Muskegon Heights.

On December 9, 1911, defendant wrote plaintiff complaining that the Morehead System which it had installed according to catalogue and as Crowley suggested was not working satisfactorily, the particular complaint being:

"The trap over the boilers does not take care of the water from the trap in the basement and is working continuously to get rid of the supply."

On December 12th, Crowley visited the factory and examined the installation to ascertain the difficulty, if any. He testified that the only trouble was due to a failure to follow instructions, but even as installed he found on testing it out the equipment was meeting the full requirements of the guaranty. Before leaving he gave further instructions and obtained the following paper, signed by defendant per J. L. Gillard, assistant of defendant's general manager, who was then in charge of defendant's office and had a hand in preparing the same, and who stated he did not think his right to sign defendant's name on any business which came up in the office had been questioned during the past 15 years:

"MUSKEGON, MICHIGAN, 12/12/11.
"MOREHEAD MANUFACTURING COMPANY,
"Detroit, Michigan.
"*Gentlemen:* Have given instructions to John Pedler to raise the trap as high as possible and also put

2-inch lines in boiler instead of 1¼-inch and which will be done as soon as possible. The traps are working O. K. at the present time, keeping the system drained dry.

"We will follow up the above.

"ALASKA REFRIGERATOR COMPANY,
"J. L. G."

On December 27th defendant wrote plaintiff that the system was not giving results and it had discontinued its use, asking for instructions at once as to the disposition of the traps, following which Crowley again visited the plant, made thorough inspection and tests which showed, as he testified, that the apparatus when operated exceeded the guaranty, although his instructions as to raising the trap and use of a 2-inch pipe in boiler had not been followed; but he also discovered from conversations with Mr. Ford, defendant's manager, and on inspection of the plant, that they had availed themselves of the information received from him, in regard to the proper method of draining steam apparatus as worked out by plaintiff, and applied it to defendant's plant, securing the desired results without using the equipment bought from plaintiff. Of this he testified:

"In my conversation with Mr. Ford, Mr. Ford acknowledged that he was willing to pay me for my information for increasing the heat in their kilns, but he didn't believe in paying for the traps. Through our demonstration they could see where they could get almost the same results, or practically the same results by taking my information and carrying on the old system, so he was willing to pay me for my information given them, but he wouldn't pay for the traps. He didn't make any claim that I know of at that time that we had failed to fill our guarantees because it had been proved that I had done what I agreed to. I told him I wasn't selling information. I was selling Morehead steam traps. * * * On my tests there I found that they were using the by-passes open on the pumps, which is the same as I recommended on my traps."

Without direct reference to Crowley's testimony as to such proposal, Ford testified in general denial:

"I have no knowledge that any ideas were suggested by these machines or by Mr. Crowley that were utilized in continuation of the old system of heating. * * * The matter of the steam plant and the kiln and the heating system and the electric light system is left with the chief engineer."

On January 24, 1912, defendant wrote plaintiff:

"We have made further tests of your traps, and we find we can get better results with our own pumps and have accordingly discontinued the use of the traps and would ask you to kindly send us shipping instructions."

Claiming that the equipment it furnished fully complied with the guaranty plaintiff demanded payment and on refusal brought this action for the contract price in the circuit court of Muskegon county where on trial by jury it recovered verdict and judgment for the same.

Defendant's assignments of error include the proposition that by the terms of the contract it had an absolute right to reject the equipment as unsatisfactory and a verdict should therefore have been directed in its behalf as requested; that testimony offered by defendant was erroneously rejected and the charge as given was erroneous in the court's construction of the contract, and various other specified particulars.

Upon the first proposition defendant contends that by the terms of the contract it had the option, and absolute right as a matter of law, to determine whether the equipment was satisfactory to it and if not to reject the same under the ruling in *Wood Mowing Machine Co.* v. *Smith*, 50 Mich. 565 (45 Am. Rep. 57), and analogous cases cited; while plaintiff contends that the subject-matter of the contract was only desirable for mechanical fitness and value in increasing the effi-

ciency of a manufacturing plant, involving no question of personal sentiment or individual taste, making the refusal a question of whether it was in bad faith or honest dissatisfaction because of failure to meet the guaranty an issue of fact for the jury under the testimony.

The contract provides that the equipment is to be furnished subject to defendant's approval, "as per the guarantee above." The guaranty above is that the system sold will "handle all of our exhaust steam and all of our live steam that we use for heating purposes throughout the dry kilns and entire plant, * * * make a saving of 5 per cent. in fuel day times and 20 per cent. increase of heat in day times on the fans, * * * reduce the back pressure on the engine one-third," and agrees that if the equipment does not do the work as guaranteed plaintiff will remove the same "without any expense to the Alaska."

Defendant based its refusal to accept the equipment on the ground that it did not do the work as guaranteed. Plaintiffs claimed that although not installed as directed, it did on thorough test prove to more than fill the guaranty. The testimony in the case was largely devoted to that square issue of fact. A claim was also made by plaintiff that defendant's refusal to accept was arbitrary and in bad faith, it having availed itself of information furnished by Mr. Crowley which enabled improvements to be made in the plant to produce the desired result without utilizing plaintiff's system, which was also a disputed question of fact.

The case of *Wood Mowing Machine Co.* v. *Smith, supra,* is discussed and the true rule stated in *Hutton* v. *Sherrard,* 183 Mich. 359 (L. R. A. 1915E, 976). This rule is also concisely stated in 13 C. J. p. 678, as follows:

"It would seem that, where the subject-matter of the contract involves a question of individual taste

or sentiment rather than of utility, the good faith of the party declaring his dissatisfaction cannot be inquired into. But where the subject-matter of the contract relates to a thing which is ordinarily desirable only because of its commercial value or of its mechanical fitness, it is held that the party must act in good faith and must be honestly dissatisfied."

Under the claims of plaintiff and conflicting testimony, the question of whether defendant arbitrarily and in bad faith asserted dissatisfaction and refused to accept and pay for the equipment, which in fact came up to the guaranty, because through the information furnished by Crowley it could get the desired results without it, was a proper question for the jury.

Of the rulings upon objections to offered testimony, that most strenuously urged as error by defendant is the exclusion of a book which Pedler testified contained a record of temperatures kept by him in 1909 taken at No. 2 kiln, the fan, and at the return of the air coming back into the fan room. He testified that he also kept records of temperatures for 1910 and 1911 but they were lost when a new roof was put upon the engine room. A book which he produced showing records of temperatures taken in 1912, which he stated he started to take when Crowley was out there, was admitted in evidence against the plaintiff's objection although copied from what he called the "pencil book" which was not offered, and defendant was allowed full latitude in whatever proofs and records it desired to offer as to temperatures and other matters relating to the equipment and operation of its plant at, and a reasonable time before, the contract was made, as well as after, but the court excluded the book for 1909 as relating to a too remote and disconnected period. We find no error in this ruling; the records in that book were made nearly two years before the contract was entered into, were followed by no continuing record of the intervening

period or any evidence that the condition and equipment of the plant was then the same as when the contract was entered into.

It is further earnestly contended that the charge wrongly construed the contract and was made prejudicially unfair to defendant by argument in which the court practically decided questions of fact which should have been impartially left to the jury. Upon the warranty in the contract of an increased temperature of 20 per cent., the court instructed the jury that it meant not the temperature in the kilns as defendant contended but at the mouth of the tube or fans, saying in part:

"Now, still farther, to justify that conclusion, that is the very construction that the parties themselves put upon this contract, by the undisputed evidence in this case. Why do I say that? I say that because Mr. Pedler took Mr. Crowley out there at the time that he came to investigate and see if there was anything wrong, took him out to those flues, not out to the kilns at all, and pointed out the thermometer there, and there he took the readings of the thermometer, at that place, so that it is the construction that was placed by the parties upon the meaning of that contract, so that you are to take that."

While perhaps unnecessarily stressed by argument, this instruction was not erroneous as applied to the warranty to which it was directed—to "give 20 per cent. increase heat day times on the fans." That plain sentence of simple words requires no interpretation, or evidence to determine its meaning.

But unfortunately the charge was not limited in argument to construction of the contract. In dealing with the testimony the court by argument quite clearly indicated an opinion on important controverted facts which were for the jury.

Pedler testified that when installing the equipment he carefully followed the directions in the catalogue

and instructions given by Crowley when the order was taken; that Crowley knew the size of the pipe going into the boiler and gave no instructions to change it. Crowley also admitted he did not then direct that it be changed. He testified that on December 12, 1911, when he visited the plant on defendant's complaint, and wrote the letter of that date signed by Gillard, the equipment was filling the warranty although his instructions had not been followed. Gillard signed the letter at his request. It stated certain instructions had been given for changes, including a larger pipe. Pedler testified he did not know what the letter contained, was not consulted when it was written, and did not promise to put in the two-inch pipe; that he did raise the trap higher as suggested by Crowley when they were looking over the plant but had not changed the pipe. Gillard testified he knew nothing about the facts stated in the letter and signed it on Crowley's plea that he "wanted a paper to show he had been there," doing it primarily to show that fact and the date, and also with the idea of working out his suggestions.

The situation at that time is in marked dispute. Crowley testified that the equipment was working up to the warranty and plaintiff had then fulfilled its contract, although his instructions had not been followed. Pedler testified all instructions as to installment had been fully complied with and the equipment failed to better conditions in the particulars guaranteed. On the conflicting theories and testimony of both parties each had fulfilled its contract obligations and the other had not. This letter was competent testimony for its bearing upon the major issues of fact involved. It is claimed and denied that the letter was obtained by subterfuge. It was the function of counsel to argue and the jury to determine what weight should be given it in connection with all the other testimony in the

case. The court emphasized and dwelt upon it partly as follows:

"And this last letter—it is all important; it all goes together—is important because it was written there in the office of the Alaska Refrigerator Company and concerning the single complaint that they had made in the letter before that, and there they say that that had been remedied, in writing, put it down in black and white, and there also was the promise to follow out the placing of those lines in the boiler, putting in a 2-inch pipe in place of an inch and a quarter pipe. They said they would follow up the above, and do whatever other suggestions was made by Mr. Crowley. They didn't do that; they didn't do that."

Defendant contended that the warranty to reduce back pressure on the engine was not fulfilled. Plaintiff claimed that it was. Pedler and Crowley were the principal witnesses on that subject. Their testimony was in direct conflict in various particulars. Each assumed to explain the meaning of back pressure and manner by which it could be reduced. Pedler testified that in defendant's plant they used a valve in the exhaust line, and explained how it operated for that purpose. Asked: "*Q.* What was the result of these traps with reference to that?" He replied: "It didn't make any difference whatever."

Crowley testified in relation to a vacuum in the system working to that end which he said did not necessarily have to be maintained through the whole system. Asked: "Where is this vacuum maintained?" He answered: "In the tank of the trap. *Q.* Is that over the entire system? *A.* No, sir; just on my condenser trap running back into the system of the tail pipes of the heater. Sometimes it recedes way back in the heater."

It was contended by defendant that if there was not a continuous vacuum on the whole system the back pressure was not and could not be reduced one-third.

Under the testimony as to scientific principles involved, methods and results, the question of meeting the warranty as to reduction of back pressure was clearly one of fact. This the court discussed argumentatively and practically took from the jury, saying in part as follows:

"It isn't enough for a man to say that the back pressure was reduced. That is simply a conclusion. But in relation to matters of this kind it would be very easy indeed to go into this matter and make an experiment to determine whether the back pressure was reduced or not, very easy to know how much the back pressure was before those traps were installed. They have told you how that might be done in relation to the safety valve that they had there, and they haven't shown any change as far as that is concerned. I call that to your attention. They had the right and it was easy for them to make experiments to determine about those other matters, but they haven't made any experiments or anything of that kind, and, as I said before, a simple conclusion made by a witness, even Mr. Pedler, that the back pressure was not reduced is not sufficient, because the pressure before the time of the guarantee and the pressure after the time of the guarantee was material, and it is for the defendant to show by some proof that the court tells the jury should be accepted as proof in relation to that matter."

The court did not, however, specifically point out to the jury what proof should or could be accepted in relation to that matter.

More or less argument of the facts along similar lines runs through the court's discussion of the testimony in this lengthy charge, disclosing views or impressions from which a jury would unavoidably be advised of the court's opinion as to issues of fact. In *McDuff* v. *Journal Co.*, 84 Mich. 1, it is said:

"Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury."

This charge considered as a whole in the light of the verdict following its tenor leads to the conviction that such was the case here; which prejudicially deprived defendant of its right to a fair trial of the facts in dispute by a jury whose sole duty it was to independently determine them under applicable principles of law impartially given by the court without argument of facts. *Hine* v. *Commercial Bank*, 119 Mich. 448; *Walts* v. *Walts*, 127 Mich. 607.

The other errors assigned do not call for serious consideration or are such as not likely to occur upon a retrial.

The judgment is reversed, with costs, and a new trial granted.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

LUDWIG *v.* BRUNER.

1. BANKS AND BANKING—JOINT DEPOSITS — SURVIVORSHIP — STATUTES—JOINT TENANCY IN PERSONALTY.
   Under Act No. 248, § 3, Pub. Acts 1909 (section 8040, 2 Comp. Laws 1915), money deposited in a bank payable to husband or wife "either or the survivor," on the death of the wife becomes the sole property of the husband.

2. JOINT TENANCY—PERSONAL PROPERTY—SURVIVORSHIP.
   Joint tenancy in personal property with its right of survivorship does not exist in this State.

3. SAME—ESTATES OF DECEDENTS—HUSBAND AND WIFE.
   Where a husband and wife, on the sale of a farm held by

See note in L. R. A. 1917C, 550.

them by the entireties, took a purchase money mortgage "as joint tenants," the husband as survivor of his wife did not take title to her interest in the mortgage, in the absence of testimony tending to establish a gift *inter vivos* or one *causa mortis*. BIRD, MOORE, and BROOKE, JJ., dissenting.

Appeal from Kalamazoo; Weimer, J. Submitted January 11, 1918. (Docket No. 51.) Decided December 27, 1918.

Bill by Samuel D. Ludwig against Henry W. Bruner, executor of the last will of Sarah E. Ludwig, deceased, to determine the title to a certificate of deposit and a mortgage. Defendant filed a cross-bill for an accounting. From a decree for defendant, plaintiff appeals. Affirmed in part, and reversed in part.

David Anderson, for plaintiff.

W. J. Losinger, for defendant.

On October 9, 1883, plaintiff purchased a farm in St. Joseph county, Michigan, taking title thereto in his own name. On January 17, 1885, the title to said farm was placed in "Samuel Ludwig & Sarah E. Ludwig, husband and wife, as joint tenants." At the time the title to the farm was placed in the names of plaintiff and his wife as tenants by the entireties, Mrs. Ludwig contributed a considerable portion, perhaps more than one-half of the value thereof, which was used to pay off the mortgage thereon. From January 17, 1885, until December 11, 1914, a period of almost 30 years, plaintiff and his wife lived upon said farm. On the latter date they sold it for $3,500. Of this sum there appears to have been paid $1,800 in cash and a purchase money mortgage was given by the vendee to the vendors for $1,700. This mortgage runs to "Samuel Ludwig and Sarah E. Ludwig as joint

tenants." The mortgage was made collateral to a promissory note for the same amount in which the payees are described as in the mortgage. Of the $1,800 paid in cash, $1,750 was at once deposited in the Kalamazoo County State Bank of Schoolcraft under a certificate made payable to "Samuel or Sarah E. Ludwig, either or the survivor."

On August 30, 1915, Sarah E. Ludwig executed with proper legal formalities a last will and testament by the terms of which she gave, devised and bequeathed all her estate both real and personal to her husband, the plaintiff herein, so long as he should live, with remainder over to her brother, Henry W. Bruner, defendant herein. On September 22, 1915, Sarah E. Ludwig died. Her will was admitted to probate without objection on the part of the plaintiff and a contest immediately arose between plaintiff and defendant, as administrator of Sarah E. Ludwig's estate, as to the ownership of the certificate of deposit and the mortgage described. Plaintiff herein filed his bill in which the foregoing facts were set up and prayed that defendant be required to show by what right or title he claimed any of said securities or personal property. To this bill defendant filed an answer and cross-bill in which he prayed that plaintiff be compelled to account to defendant, as executor of the will of Sarah E. Ludwig, for said securities. The learned circuit judge filed an opinion in the case, by the terms of which the estate of Sarah E. Ludwig was held to be the owner of an undivided one-half of the proceeds of the certificate of deposit and of the mortgage, and a decree was entered in conformity with such opinion. From this decree plaintiff appeals.

FELLOWS, J. (*after stating the facts*). So far as the certificate of deposit is concerned, we must hold that the court was in error, and that the property in

the same rests solely in the plaintiff. There is not sufficient evidence in the case to lead us to conclude that the presumption created by the statute (Act No. 248, § 3, Pub. Acts 1909; 2 Comp. Laws 1915, § 8040) has been overcome. That act is applicable to the instant case. *In re Rehfeld's Estate,* 198 Mich. 249; *People's State Bank* v. *Miller's Estate,* 198 Mich. 783; *Powell* v. *Pennock,* 198 Mich. 573.

Touching the mortgage I think a different situation is presented. There is no testimony establishing or tending to establish a gift *inter vivos* or one *causa mortis.* This court has repeatedly held that in the absence of proof sufficient to establish either a gift *inter vivos* or *causa mortis* the survivor in case of joint title in personal property does not take the entire title by such survivorship. *Wait* v. *Bovee,* 35 Mich. 425; *Luttermoser* v. *Zeuner,* 110 Mich. 186; *Burns* v. *Burns,* 132 Mich. 441; *State Bank of Croswell* v. *Johnson,* 151 Mich. 538. These cases and others which might be cited establish to my mind the doctrine in this State that joint tenancy in personal property with its right of survivorship does not exist. I fully discussed this question in the recent case of *Hart* v. *Hart,* 201 Mich. 207, and shall not here repeat what was there fully considered.

I am impressed that under our decisions, neither by force of the language here employed or by force of the law, did the defendant as survivor of his wife take title to her interest in this mortgage. The doctrine of *stare decisis,* in my judgment, prevents us from holding that the defendant here takes the entire mortgage.

Wait v. *Bovee, supra,* was written over 40 years ago. It laid down a rule. It was a rule of property which has been followed by this court without deviation ever since. In the instant case the mortgage runs to the husband and wife "as joint tenants"; in

the case of *State Bank of Croswell* v. *Johnson, supra,* the certificate of deposit was indorsed with a direction to issue a new certificate to the husband and wife "or the survivor of them." Had the argument here advanced by my Brother BIRD been there accepted by this court there would have been no occasion to there consider the questions of fact involved. But this court there declined to deviate in the slightest degree from *Wait* v. *Bovee* and expressly stated:

"Our decisions that the law of survivorship does not apply in the case of joint ownership of personal property does not affect the right of a donor to make a gift to his surviving wife."

—and held that the transaction there involved partook of the nature both of a gift *inter vivos* and of a gift *causa mortis.* In *Burns* v. *Burns, supra,* the deposit originally stood in the name of the husband; by his direction the wife's name was added, the husband saying, "That it was as much her money as it was his money." The money was held to belong to the husband's estate.

I doubt that it may be said to be a matter of common knowledge that many married people in every community are holding their personal property in supposedly joint tenancies. I think it may be a matter of common knowledge that many of them have their savings deposited in banks payable to them or either or the survivor of them, or words of similar purport. The legislature of the State has taken cognizance of this fact and has provided a rule of evidence in such cases. Section 8040, 2 Comp. Laws 1915. But it has gone no farther. If, in legislative wisdom, it should go farther and apply such rule of evidence to personal property generally, affirmative action by that co-ordinate branch of the government should be required. This court should not reverse a rule of property which has been unquestioned for over 40 years,

and under which rights of creditors of decedents have been protected and no small amount of revenue by way of inheritance taxes has been contributed to the support of the State government.

I think the decree of the court below as to the certificate of deposit should be reversed, and as to the mortgage should be affirmed. Plaintiff should have his costs in this court, but neither party should recover costs of the hearing at the circuit.

OSTRANDER, C. J., and STEERE, STONE, and KUHN, JJ., concurred with FELLOWS, J.

BIRD, J. (*dissenting*). I am in accord with Mr. Justice FELLOWS' conclusion in this case that the certificate of deposit is the sole property of the plaintiff, but I am unable to subscribe to his conclusion that plaintiff owns only an undivided half of the mortgage. It is my opinion that upon the death of his wife the plaintiff, as survivor, became the sole owner of both the bank deposit and mortgage.

The common law recognized joint tenancy in both real and personal property. 1 Cooley's Blackstone (4th Ed.), pp. 180, 399. At common law when a conveyance was made of either real or personal property to two or more persons, it was construed to be in joint tenancy and it was, therefore, necessary in creating an estate in common to use some words indicating such an intention. *Pruden* v. *Paxton*, 79 N. C. 446; 38 Cyc. p. 5. Early in the history of our jurisprudence the legislature reversed this rule as to real estate and provided that a conveyance of real estate to two or more persons should be construed as an estate in common unless expressly declared to be in joint tenancy. And this is the law today. Section 11562, 3 Comp. Laws 1915. Analogous to this legislative rule with reference to real property this court promulgated a like rule with reference to personal property and

refused to construe conveyances of personal property to two or more persons as joint tenancies. *Wait* v. *Bovee,* 35 Mich. 425; *Luttermoser* v. *Zeuner,* 110 Mich. 186. These cases have gone no further, however, than to refuse to recognize joint tenancies in conveyances where there was nothing beyond the designation of the names of the parties to indicate the kind or quality of the estate intended to be conveyed. In *Wait* v. *Bovee* nothing appears in the mortgage aside from the joint names to indicate the nature of the tenancy, and the same is true of the case of *Luttermoser* v. *Zeuner,* although there is some language in the opinion of the latter case which might lead to a different conclusion. The mortgage in that case was offered in evidence but only the following appears in the record:

"Mortgage, ordinary form, given by Fairview Land Company April 12, 1893, consideration $15,470, to Carl Frederick Zeuner and Johanna Rebecca Zeuner, on 19.47 acres of land in Springwells, Wayne County, Michigan." R. & B., June Term, 1896, Docket No. 8, p. 20.

Inasmuch as the question of joint tenancy was involved in those cases I assume if there had been any language of the parties indicating that the mortgage was to be held in joint tenancy, it would have appeared in the record. No case of this court has been called to our attention where it has refused to recognize the right of parties to make such an agreement if they chose, and it has enforced such conveyances of personal property where it was clear from the instrument that it was intended to be owned in joint tenancy. An illustration of this is the late case of *Negaunee National Bank* v. *Le Beau,* 195 Mich. 502. In this case a father made a deposit in a bank for himself and his daughter. The deposit appeared upon the books of the bank in the following form:

"The sum deposited to this account belongs to
Signature: "EUCHRIST LE BEAU,
"SOPHIA CHARLES,
jointly: it being understood each may withdraw on his or her individual order during their joint lives, and that any balance upon the death of either shall belong to the survivor.
(Signed) "EUCHRIST LE BEAU,
(Signed) "MRS. ED. CHARLES."

The right of the daughter as survivor to take the deposit after the death of her father was contested, and upon reaching this court it was said:

"In this case it is not necessary to predicate determination upon the fact that the passbook prior to the death of Euchrist Le Beau was in possession of the donee and to draw an inference from that possession that the same was given to her in his lifetime with the intention of giving her the fund represented thereby. He had already given her the fund by his unequivocal act at the moment the deposit was made."

An attempt was made to sustain the right of the survivor to take the deposit by force of the provisions of Act No. 248, Pub. Acts 1909, but opposing counsel questioned the constitutionality of that act. The court, however, laid aside this argument, saying:

"It is asserted by appellant that said statute, if applicable, is unconstitutional for various reasons assigned. Without casting any doubt upon the validity of the legislation in question and following our usual practice, we decline to construe this phase of the question, *being able to reach a determination of the issue involved upon other grounds.*"

The right of the survivor to take the deposit was sustained and upon no other theory than that she was a joint tenant with her father and took the deposit as survivor. The daughter stood in the same relation to the deposit that plaintiff does to the mortgage in question. If the entire deposit was hers as survivor the plaintiff is sole owner of the mortgage as survivor. See *In re Rehfeld's Estate,* 198 Mich. 249.

It is within the knowledge of nearly every practitioner that many married people in every community are holding their personal property as well as their real estate, as they think, in joint tenancy to avoid the trouble and expense of probating their estates. I am unable to see any valid reason why such an agreement should not be enforced by this court where it appears upon the face of the conveyance that such was the intention of the parties. There is no statute prohibiting it, neither is there any rule of construction which has been followed by this court which would make such a holding inconsistent. Our court has simply refused to recognize the common-law rule in the creation of a joint estate in personal property, namely, that a simple conveyance of personal property to two or more persons creates an estate in joint tenancy, but the right of the parties themselves to create the relation by express words has never been denied, and is upheld by this court in *Negaunee National Bank* v. *LeBeau, supra.*

In other States where the common-law rule has been abrogated, as here, joint tenancy with its incident of survivorship is recognized where the parties themselves have provided for it. Joint tenancy has been abolished in the State of Georgia, but it is held that the doctrine will be recognized where it is created by act of the parties. In the case of *Equitable Loan & Security Co.* v. *Waring,* 117 Ga. 599 (62 L. R. A. 93, 44 S. E. 320), where a like question is discussed, it is said:

"While the doctrine of survivorship as applied to joint tenancies has been distinctly abolished and does not exist in this State, there is no law of this State that we are aware of which prevents parties to a contract, or a testator in his will, from expressly providing that an interest in property shall be dependent upon survivorship. Of course, all presumptions are against such an intention; but where the contract or will provides, either in express terms or by necessary impli-

cation, that the doctrine of survivorship shall be recognized, we know of no reason why a provision in the contract or will dependent upon such a doctrine may not become operative under the laws of this State. * * * In Georgia the mere creation of the estate in two or more persons never draws to it survivorship as an incident, and the presumption is in all cases that survivorship was not intended. But where, by express terms or necessary implication, a survivorship is provided for, the law of Georgia allows it to exist. This exact question has been passed upon in other States having statutes abolishing the doctrine of survivorship as applied to joint tenancies. In *Arnold* v. *Jack's Ex'rs*, 24 Pa. St. 57, the supreme court of Pennsylvania held that, though survivorship as an incident to joint tenancies had been abolished in that State, it might be expressly provided for by will or deed; Knox, J., in the opinion saying:

"'But conceding that the right of survivorship as an incident of a joint tenancy, no matter how created, is gone, it by no means follows that this right may not be expressly given, either by a devise in a will or by grant in a deed of conveyance. It may cease to exist as an incident and yet be legally created as a principal.' Citing authorities.

"In the case of *Taylor* v. *Smith*, 116 N. C. 531 (21 S. E. 202), the supreme court of North Carolina held that the act abolishing survivorship in estates in joint tenancy did not prohibit contracts making the right of the parties dependent on survivorship. In the opinion Avery, J., said:

"'The act of 1784 abolishes survivorship where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship.'"

I think the decree should be reversed and plaintiff should be declared to be the sole owner of the bank deposit and mortgage. See, also, 17 Am. & Eng. Enc. Law (2d Ed.), p. 650, and cases cited. Plaintiff is entitled to his costs in this court.

MOORE and BROOKE, JJ., concurred with BIRD, J.

YOUNG *v.* PHILLIPS.

1. SALES—RESERVATION OF TITLE—CONDITIONAL SALE—DEFINITION.
   A conditional sale, as that term is used and understood in the affairs of business, is an agreement for the sale of an article of merchandise or other chattel in which the vendee undertakes to pay the price, and possession of the article or chattel is immediately given to the vendee; but the property in—that is, the title to—the same is not to pass to the vendee until the purchase price is fully paid.
2. SAME—REMEDIES—RIGHT TO SUE—PASSING TITLE.
   Under such contract, if the vendee fails to make the payments in accordance therewith, the vendor can immediately exercise his right to take the property, or he may sue upon the contract and recover for the unpaid purchase money; but by taking the latter position he makes the sale absolute. *Button* v. *Trader*, 75 Mich. 295.
3. SAME—INTENT—CHATTEL MORTGAGE—RECORDING CONTRACT.
   The giving of an instrument, in form purporting to reserve title in the vendor, where the intent of the parties is the giving of security, is in reality the making of an absolute sale with the retention of a lien by way of security, and must be recorded as a chattel mortgage under section 11988, 3 Comp. Laws 1915.
4. SAME—RESERVING TITLE—CONDITIONAL SALE—ACTION TO RECOVER DEBT—INCONSISTENCY—REMEDIES.
   If of the two elements, reservation of title and the right to maintain an action to recover the debt, the latter is missing, there is no inconsistency, and such contract is a pure conditional sale, under which the goods may be retaken by the vendor even from third parties, and the vendor may still have an action for breach of contract against his vendee.
5. SAME—RESERVING TITLE—INTENT—CHATTEL MORTGAGE.
   But if the instrument purports to reserve title and to give a right of action to recover the debt without passing title, the two being inconsistent according to the test in *Atkinson* v. *Japink*, 186 Mich. 335, it must be concluded that the intent of the parties was to make an absolute sale with the reservation of a lien by way of security.

See notes in 64 L. R. A. 833; 35 L. R. A. (N. S.) 385; L. R. A. 1917D, 942.

Error to Wayne; Davis, J., presiding. Submitted June 4, 1918. (Docket No. 13.) Decided July 18, 1918. Reargued October 24, 1918. Former opinion affirmed December 27, 1918.

Replevin in justice's court by Mathew A. Young against Andrew T. Phillips and another for the possession of an automobile. There was judgment for defendants, and plaintiff appealed to the circuit court. Judgment for defendants. Plaintiff brings error. Affirmed.

Barbour, Field & Martin (*Thomas G. Long* and *Stevenson, Carpenter, Butzel & Backus*, of counsel), for appellant.

Welsh, Bebout & Kahn, for appellee.

William Van Dyke, amicus curiæ.

ON REHEARING.

KUHN, J. The motion for rehearing was granted in this case because of the claim made that the tests announced in *Atkinson* v. *Japink*, 186 Mich. 335, were wrongly applied to the contract here in question, and that the rule announced in the opinion in this case (202 Mich. 480) was in conflict with previous adjudications of the law of conditional sales by this court. Counsel representing other interests than those immediately involved have been permitted to file briefs as *amici curiæ*, and the various contentions advanced by counsel have been fully argued and ably briefed. In our opinion, however, the presentation of the entire matter calls upon us rather to determine, not whether the present case was correctly decided, but whether or not the tests to be applied as set forth in *Atkinson* v. *Japink* were correctly announced.

The language of the various forms of conditional

sale contracts which are in everyday use by business houses varies, but the underlying idea of, and the objects and purposes to be accomplished by all of these different forms of contracts are stated by counsel in their brief, in the main properly we think, and which we quote, with certain modifications, as follows:

"A conditional sale, as that term is used and understood in the affairs of business, is an agreement for the sale of an article of merchandise or other chattel in which the vendee undertakes to pay the price, and possession of the article or chattel is immediately given to the vendee; but the property in—that is, the title to—the same is not to pass to the vendee until the purchase price is fully paid."

If, under such a pure conditional sale contract, the vendee fails to make the payments in accordance therewith, the vendor can immediately exercise his right to take the property, or he may sue upon the contract and recover judgment for the unpaid purchase money; but by taking the latter position he makes such sale absolute, in accordance with the decision in *Button* v. *Trader*, 75 Mich. 295. We may assume, then, that if the contract simply attempts to do what is set forth in this definition, there can be no question that the instrument is a conditional sale, and, under our recording laws, would not have to be recorded. But, when it becomes evident from the instrument itself that it was the intention of the parties not to create a pure conditional sale contract, but, as was said in *Atkinson* v. *Japink*, that the title to the property was retained in the vendor simply for security, thereupon the instrument loses its characteristics as a pure conditional sale and in reality becomes a "conveyance intended to operate as a mortgage of goods and chattels," and must be recorded according to the terms of the recording statute. 3 Comp. Laws 1915, § 11988. We may have been, perhaps, unfortunate in the use of certain language in

saying that the title is reserved for security only, because, under the present theory of a chattel mortgage, the title to the property remains in the mortgagor and the giving of the instrument does not transfer title. *People* v. *Bristol,* 35 Mich. 33; *Grove* v. *Wise,* 39 Mich. 163; *Brink* v. *Freoff,* 40 Mich. 613; *Cadwell* v. *Pray,* 41 Mich. 307; *Haynes* v. *Leppig,* 40 Mich. 602; *Wilson* v. *Montague,* 57 Mich. 640; *Corbett* v. *Littlefield,* 84 Mich. 35 (11 L. R. A. 95). So that the giving of an instrument, in form purporting to reserve title in the vendor, where the intent of the parties is the giving of security, is in reality the making of an absolute sale with the retention of a lien by way of security. It may be conceded that the state of the law was somewhat confusing before the decision in *Atkinson* v. *Japink, supra,* and it may be difficult to harmonize the various decisions of the court on this question, such as *Fuller* v. *Byrne,* 102 Mich. 461, and *American Harrow Co.* v. *Deyo,* 134 Mich. 639; but with the tests so clearly announced in the *Atkinson Case,* it seems to us that there should be no difficulty encountered in attempting to determine the character of any of this class of instruments by applying the tests therein set forth. We think that decision announced a rule and tests which can be readily applied and was of distinct value because of that fact. If, of the two elements, reservation of title and the right to maintain an action to recover the debt, the latter is missing, there is no inconsistency, and such a contract answers to the application of test 1 by remaining within that test, and the conclusion may be immediately drawn that there was no intention to make an absolute sale with the reservation of lien by way of security. Such a contract becomes a pure conditional sale, under which the goods can be retaken by the vendor even from third parties, and the vendor may still have an action for damages for breach of

contract against his vendee, if he has suffered any such damage. But if the instrument purports to reserve title and to give a right of action to recover the debt without passing title, the two being inconsistent according to the test in *Atkinson* v. *Japink*, it must be concluded that the intent of the parties was to make an absolute sale with the reservation of a lien by way of security.

Being of the opinion that the case was properly decided according to the rules announced in *Atkinson* v. *Japink*, it follows that we cannot arrive at any different result than heretofore announced, and the judgment is therefore affirmed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. OSTRANDER, C. J., did not sit.

VAN LONKHUYZEN *v.* DAILY NEWS CO.

1. LIBEL AND SLANDER—JUSTIFICATION—RES JUDICATA.
   On a former hearing of this cause (195 Mich. 283), this court held that the words complained of were libelous *per se*, and that whether they were justified—excused, warranted—because they were fair comment was a question for the jury.

2. SAME—MATTERS OF PUBLIC INTEREST—CRITICISM.
   Where plaintiff published an article upon a matter of current public concern, criticising action of public officials, comment and criticism from those who held other views were invited or at any rate excused.

3. SAME—BURDEN OF PROOF—FAIR COMMENT—QUESTION FOR JURY.
   The *onus* is on plaintiff, where a defense of fair comment is raised, just as in any other case, to show that the

words are reasonably capable of being understood as a libel on him, and it is for the judge to say whether the published article is capable in law of being a libel, and, the court having determined this point favorably to the plaintiff, then whether the words complained of are, or are not, fair comment, is essentially a question for the jury.

4. SAME—RIGHT TO CRITICISE—NEWSPAPERS—PRIVILEGE.
In making the defense of fair comment, defendant had no benefit of privilege; the liberty of the press, unless affected by statute, being no greater and no less than the liberty of every citizen; it is the right of every one, not the privilege of any particular one, to comment fairly and honestly on any matter of public interest.

5. SAME—TRIAL—INSTRUCTIONS.
The court should have instructed the jury that the article in question is libelous unless it is fair comment, and that whether or not it is fair comment was for them to decide, under proper instructions.

6. SAME—EVIDENCE—REPETITION OF LIBEL—MALICE—DAMAGES.
Evidence of repetition of the libel before suit was begun is admissible in aggravation of damages, and repetition after suit began and after a first trial may be proved as evidence of malice if the publication is not found to be in fact fair comment.

7. SAME—EVIDENCE—SELF-SERVING EVIDENCE.
It was error to admit in evidence, as tending to rebut malice, an editorial headed "Dr. Van Lonkhuyzen," printed in defendant newspaper after the first trial of the case was ended in the circuit, since if regarded as favorable to defendant, it is self-serving evidence made by defendant in its own behalf, and is not in the "same class" as other articles published by defendant after the publication of the alleged libel, and offered by plaintiff to show malice.

Error to Kent; Perkins, J. Submitted October 16, 1918. (Docket No. 56.) Decided December 27, 1918. Rehearing denied May 1, 1919.

Case by John Van Lonkhuyzen against the Daily News Company for libel. Judgment for defendant. Plaintiff brings error. Reversed.

Dorr Kuizema and *Smedley & Linsey*, for appellant.

Norris, McPherson, Harrington & Waer, for appellee.

Upon a former trial of this cause, a judgment for the defendant, entered upon a verdict directed for defendant, was reversed and a new trial granted. 195 Mich. 283.

There are two special defenses of which notice was given, one, justification, that—

"The statements contained in the article entitled 'Playing with Fire' published by defendant in the Grand Rapids News on July 2, 1915, and alleged in plaintiff's declaration to be libelous, are true";

second, a privilege, or qualified privilege, in publishing the alleged libelous article. The defense of privilege relied upon is pleaded in the following form (it is called by defendant notice of the defense of privilege):

"That the conduct and motives of the said plaintiff and his acts and doings in composing and publishing in said 'De Wachter' the said article, 'Spelen Met Vuur,' and in causing the same to be widely circulated throughout the United States among the citizens thereof, and in instigating the composition of the said communication addressed to the President of the United States, and in causing said communication to be published in said 'De Wachter' as aforesaid, and to be widely circulated among American citizens generally, with the view and purpose of obtaining signatures of such citizens to said communication, and with the view and purpose of presenting the said communication to the President with such signatures, for the purpose and with the intent of influencing the government of the United States to act along the lines suggested in said communication were all believed by said defendant to amount to disloyalty to the government of the United States, and to threaten the peace, neutrality and welfare of the nation; and the said acts and doings of the said plaintiff as aforesaid, and the matters therein involved, concerning which the

said alleged libelous article was written and published by the said defendant, were matters of great importance and of interest to all citizens of the United States and to the nation, and involved the welfare of American citizens generally, which American citizens could only be communicated with through the public press, and the acts, doings and motives of said plaintiff as aforesaid were the proper subject of discussion in the public press, and the said defendant believed, and does believe, that the said acts and doings of the said plaintiff, and the movement sought to be instigated thereby, amounted to a public misfortune and a serious injury to the community and the American citizens in general, and the defendant, so believing, in the said article alleged by plaintiff to be libelous, discussed the said plaintiff's said acts and doings and his conduct and motives in and about the same in good faith, and without malice, and made only such statements, observations and deductions in regard thereto as it believed, on due inquiry and reasonable grounds, and under the circumstances, to be true and just, and warranted by the acts and doings of said plaintiff."

It appears from the record of the case made at the former trial that defendant offered no testimony except as its manager was called by the plaintiff for cross-examination and gave testimony, that argument followed the making of the motion by defendant for a directed verdict, in the course of which counsel for plaintiff stated that the court must not infer from what had been said in argument that there was not, or might not be, a question of fact for the jury upon the question of privilege. In advising the jury of his conclusions, the trial court said, among other things:

"There has been a motion made to take this case from the jury and direct a verdict for the defendant on the ground that the words used by the Daily News Company were not libelous and that the Daily News Company were justified in printing what they did print in view of what Dr. Van Lonkhuyzen had issued in his paper called De Wachter, an argument has been

made, and it is the court's view of the matter that the motion is well based and that you should be directed to return a verdict for the defendant without any further consideration of the case." * * *

The reasons so assigned by the court were challenged in this court by the plaintiff and appellant, who in the brief and in argument discussed them under the heads, (1) Was defendant's article libelous *per se*, and (2) Were defendant's words justified, and, aside from discussion of exceptions based upon rulings made by the court in admitting and rejecting testimony, were the points, and only points, urged. The defendant, in the brief, discussed these two principal points only, reversing the order and contending, *first*, that "the publication was justified," and, *second*, that "the publication was not libelous."

Under the first of these heads, it was argued, without reference to authority, that—

"It must be conceded that the editorial complained of contained a full and fair statement of all the facts upon which its inferences and deductions were based. It stated (1) that appellant was an alien owing no allegiance to the American flag; (2) that he had not taken out his first naturalization papers or signified his intention of so doing; (3) that he had instigated the circulation of a protest among Holland-Americans generally; (4) which protest rings throughout with dissatisfaction and doubt of President Wilson's motives, and criticises him for the kind of diplomacy he has adopted in dealing with the question of German encroachments on American commerce.

"None of these facts could either be disputed or complained of by appellant whose only complaint is that the inferences and deductions which the appellee drew as to the significance and effect of such acts and doctrines were not justified by the facts set forth in the editorial.

"The Daily News expressed the opinion that an alien is not rightfully privileged to influence American citizens in their conduct of American public affairs;

and that when such a one chooses a time of great stress and tension, when a crisis impends in which only great unanimity of public sentiment and loyalty to the government may avert war, to procure one great class of our citizens to make a public, organized assault upon the good faith and fairness of our officials in the conduct of diplomatic negotiations relating to such crisis, then that alien is not only a busybody, a meddler, and a spreader of distrust, discontent, and dissatisfaction in our government, but is a spreader of un-Americanism and sedition.

"It occurs to us, as it did to the trial court, that a political rather than a legal question is here involved, and that it requires nothing more than the instinct of American patriotism to judge as to the correctness of the appellee's estimate of the appellant's public conduct in taking the startling action that he took at such a peculiarly inappropriate time.

"We respectfully submit that the trial court did not err in holding the publication justified on the admitted facts, and that the verdict was properly directed."

Under the second head, it was argued, in part:

"The defendant dealt with the significance of appellant's political doctrine and neither attacked private character nor left doubt as to the basis of fact upon which its conclusions were based, whereby any person reading the article could assume that the defendant had other grounds for its conclusions than that which it had set up, or that private character was being commented upon. The defendant's agents were not even acquainted with the plaintiff. Any person reading the article had all the facts upon which it was based before him. He was not bound to draw the same inferences therefrom which the defendant had drawn, but was at liberty to draw his own inferences and conclusions and agree or disagree with the logic of the defendant, as he saw fit.

"Libel arises out of a false statement of fact and not from the inferences which may be logically drawn from a full, fair and true statement of fact, however uncomplimentary or unpleasant the inferences may be, and the defendant, after fully and fairly stating all of the pertinent facts in regard to the case, cannot be charged with libel for merely setting forth sincere

and reasonable inferences and conclusions which follow therefrom."

It was decided, (1) that the court was in error in ruling that the language, a portion of which was,

"The Rev. Mr. Van Lonkhuyzen is an interloper, a meddler, and a spreader of distrust, discontent and sedition,"

was not libelous *per se*, and (2) that it could not be determined as matter of law that the libelous language was *justifiable*. It is also said, in the opinion:

"In the case before us, the publishers were not satisfied to state the facts and allow the readers to draw their own conclusions, but followed it up by making the libelous statement for the very purpose, as admitted, to hold him up to scorn and ridicule. While the question of whether or not the limits of fair criticism have been transcended may sometimes be a question of law, ordinarily it is a question of fact for the jury, and we are satisfied that under all the facts and circumstances of this case the question of justification became one of fact for the jury to determine."

No question of privilege, or qualified privilege, was suggested, or debated, by counsel, as a question for decision by this court.

Upon a second trial, a jury returned a verdict for defendant, upon which judgment was entered. Plaintiff, appellant, states in the brief that the evidence produced at both trials was substantially the same and refers, for a statement of the facts, to that made by this court on the former appeal. He adds, however, the following:

"The defendant did not have any personal acquaintance with plaintiff at the time of the printing of the libelous editorial, and,

"On July 29th, after defendant was sued, it caused a reprint of the editorial to be published on the first page of its paper."

Appellee adds to this reference and statement of

facts the following excerpt from the testimony of defendant's manager:

"*Q.* State to the jury what your purpose was in writing—strike it out. In causing to be published this article in your paper, this editorial of July 2, 1915.

"*A.* For the purpose of stopping the circulation of a dangerous doctrine, at a critical time, because it was my duty as the head of this newspaper to comment on subjects of importance to the people and the nation at that time, for the purpose of stopping just such demonstrations as we are having at the present time. * * * Furthermore, for the purpose of doing what I thought was my duty, understanding as I did conditions in other lands and the conditions in this country. * * *

"*Q.* You claimed and now claim that the issue involved was one of some national importance, did you not?

"*A.* I do. * * *

"*Q.* Whether they were true or untrue, they injure a man's standing just the same, do they not?

"*A.* I never knew the truth to injure any man's standing. Did you?

"*Q.* I have heard of such things, but you wanted it to be understood by all the readers of your paper throughout Michigan that this man was an alien busybody?

"*A.* As referring to his views, yes, sir; political views, his propaganda and his doctrines.

"*Q.* You didn't so state when you wrote the newspaper article?

"*A.* Oh, that is all we talked about. You will find no reference in the article to Dr. Van Lonkhuyzen's personal standing and character.

"*Q.* So now you believe his personal standing is not injured at all?

"*A.* I would not think so.

"*Q.* Now, you knew that by commenting the way you did, it would offend Mr. Van Lonkhuyzen, didn't you?

"*A.* Yes, I knew that.

"*Q.* And you knew it would be doing him as much

damage as any one could with reference to his reputation and feelings?

"*A.* In connection with the subject."

And the following:

"Mr. Johnson, the publisher, and Mr. Etten, the editor of defendant's paper, were not personally acquainted with plaintiff and had no hatred or ill-will toward plaintiff at the time of the publication of the article in question."

Plaintiff, appellant, contends:

"1. The court erred in charging the jury that defendant had a qualified privilege in publishing the libelous article.

"2. The court erred in charging the jury that the question of justification was one of fact to be determined by the jury.

"3. The court erred in refusing to charge the jury the only question for them to determine was the amount of damages.

"4. The court erred in permitting in evidence the editorial dated November 4, 1915, headed, 'Dr. Van Lonkhuyzen.'

"5. The court erred in charging that the subsequent publications could only be considered as bearing upon the question of malice and not upon the question of damages."

Plaintiff is a clergyman and at the time referred to was co-editor of a church paper called "De Wachter." In this paper, on June 16, 1915, appeared an article, written by him, entitled, "Playing with Fire." In an issue of the same paper of June 30, 1915, appeared a protest or petition to the President of the United States, drawn by plaintiff and another minister of the same church—Christian Reformed Church. The petition was not signed by plaintiff, who was an alien, but was circulated among members of the church in the United States, and a large number of signatures obtained. On July 2, 1915, defendant published the alleged defamatory article. Innuendoes

omitted, the article, as set out in the plaintiff's declaration, is as follows:

" 'Playing with Fire.'

" ' "The dreadful world-war now waging, with its threat of involving us and with the very unhealthy upgrowth during the past 10 months of aggressive hyphenated Americanism in our own country has emphasized the need that we of this nation *shall become wholly united.* There should be no more hyphenated Americans. Each American of foreign birth or origin should show his good citizenship by being wholly and without reserve and without divided allegiance an American citizen and nothing else."

" 'portions of an article written by Theodore Roosevelt, the most distinguished of American citizens of Dutch extraction.

" 'It is to be sincerely and deeply regretted that a number of residents of Grand Rapids, of Holland origin, have signed a protest which is to go to President Wilson criticising him for the kind of diplomacy he has adopted in dealing with the question of German encroachments upon American commerce.

" 'They were led into this mares' nest of un-Americanism by the Rev. John Van Lonkhuyzen, pastor of the Alpine Avenue Christian Reformed Church. The Rev. John Van Lonkhuyzen is not an American citizen. He has lived in this country only four years and has not yet taken out his first naturalization papers, nor even signified his intention of so doing.

" 'In other words, hundreds of good American citizens have been led into a grievous error by an alien, who owes no allegiance whatever to the Stars and Stripes.

" 'All Americans of Holland parentage will be asked to sign the paper to be sent to President Wilson, which will criticise and seek to embarrass him, and which, at the same time, will reflect upon the good sense and patriotism of the entire Holland branch of our foreign born population.

" 'The petition, or protest, or whatever it may be, relates that the President's attitude of late is not entirely in accordance with the motive which directed him when he called for a day to be set apart for prayer. It asks that the exportation of arms be

stopped and that the investigation of the Lusitania incident be all-sided—inferring that the President has been biased.

" 'The protest rings throughout with dissatisfaction and doubt of President Wilson's motives.

" 'The whole muss was stirred up by the Rev. Mr. Van Lonkhuyzen in an article published in his church weekly, "The Wachter," entitled "Playing with Fire." The article deeply criticised the American press, and criticised the American people for announcing that they would stand behind the President in any step he might take, claiming that all the citizens might not stand behind the President. It stated that public opinion had been poisoned, that one-sided actions had been taken and one-sided policies pursued. Mr. Van Lonkhuyzen, in closing his incendiary article, said:

" ' "It is highly necessary, therefore, that a powerful protest be brought against this one-sidedness and this stirring up of public opinion towards one side. We should prevent worse things than these while it is yet in our power."

" 'The News was somewhat amazed to find what virtually amounts to sedition in Grand Rapids. The first thing to do was to investigate the source. Consequently The News telephoned Mr. Van Lonkhuyzen, to find out his exact status.

" ' "Are you an American citizen, a naturalized American?" was asked.

" ' "No, I am not an American citizen. I have never been naturalized," he replied.

" ' "Have you taken out your first naturalization papers?"

" ' "No. I have not taken them out yet."

" ' "Do you intend to become a citizen of the United States, and do you intend making application for your first papers."

" ' "Yes, I intend to take out my first papers in the near future."

" ' "How long have you resided in the United States?"

" ' "Four years. If any more inquiries come to your office, tell them I intend to become a citizen in the near future."

" 'Another alien, much more famous and able than Mr. Van Lonkhuyzen, came over here a short time ago. His name was Dernburg, and he attempted to do some criticising of the manner in which our gov-

ernment was being conducted. It was hinted to him that his presence in this country was undesirable, and he took the hint and departed for foreign shores.

" 'Evidently all the foreign meddlers did not take advantage of this rather forcible lesson. Maybe Mr. Van Lonkhuyzen never heard about it, there seems to be so much that he doesn't understand.

" 'So far as Mr. Van Lonkhuyzen is concerned personally, it makes no difference, but the pity of the thing is that probably thousands of good, loyal Americans of Holland descent are putting themselves into a false light by signing the petitions criticising our President and doubting the sincerity of his motives.

" 'The fact that the first organized criticism of President Wilson should emanate from Grand Rapids is no credit to the city.

" 'We are ashamed of the petitions and we are ashamed of the Rev. John Van Lonkhuyzen, or, rather, we are ashamed of the fact that he should live here.

" 'As he is an alien and nobody knows what fish he has to fry, it would seem that he should be the recipient of one of the famous hints from headquarters such as caused Dr. Dernburg to take his hat and go back home.

" 'We do not want trouble makers in America, whether they be English, French, Dutch, German or Japanese. The United States is today made up of a citizenry that is standing solidly behind President Wilson in his determination to protect our national honor. The Holland people have stood behind him until this plague of sedition broke out in the vicinity of Alpine avenue a few days ago.

" 'Those who have signed these protests will be sorry for what they have done. Perhaps many of them signed without thinking. That is the most charitable view of the case to take. If the protests have not been forwarded to the President, they should be thrown into the fire.

" 'The protest is a reflection upon the patriotism of every man who signs it. There has never been any reason to doubt the loyalty of American citizens of Holland birth. There should never be any reason.

" 'The Rev. Mr. Van Lonkhuyzen is an interloper, a meddler, and a spreader of distrust, discontent and

sedition. His protest against the "one-sidedness" of America's policy of dealing with its foreign affairs should entitle him to an invitation to pack his grip and go back to Europe where he belongs.

"'If the petition, or protest, ever does reach the President, the News will make sure that Mr. Wilson will receive it in the full knowledge that it originated in the brain of a busy-body alien and that it does not represent the opinions of the loyal people of Grand Rapids, be they natives or of Holland birth or extraction.'"

The article in "De Wachter" and the petition to the President, which it is claimed by defendant caused and justified the alleged libelous editorial which it published, are here set out as pleaded by defendant:

"'Playing with Fire.'

"'Playing with fire—that is what the attitude of the American Press toward the war may well be termed. We see this, too, in Italy what the result is when passions are whipped up and gain the mastery. There the people do not rule but the government rules, although it be in the form of a constitutional monarchy. That government and thereby the nation was for many years bound by treaty with Germany and Austria. That nation under the alliance has grown great. It had enjoyed all the advantages. Just recently had it received a free hand, without right, to claim and take a part of Turkey in Africa. It mixed, with Germany's support in so doing a bitter drop in the cup of England and France, both having power and influence in the Mediterranean Sea and on the coast of Africa. Now, in the hour of danger, she reverses her position. With a faithlessness rarely found in history, Italy now, in this war of nations, throws her force against her allies who helped to make her great. Where is now the confidence and faith in one another. Moreover, bribed by a nation whose mouth is filled with Germany's violation of treaties, and says, note well, and says that therefore she declared war upon Germany.

"'And what is the origin of all this in Italy? In a great measure, through the same means used here to

fire the passions. The public press in Italy played continually upon the hatred against Austria. The government did not desire war. But finally it was obliged to yield before the storm. Otherwise (so constantly was the threat) there would be revolution and barricades erected. It was uttered publicly. It hissed members of the Royal Family publicly on the street. It wished to and should fight, and although Austria yielded nearly all that Italy could by means of a few victories have desired. And the war is on. Thousands shall fall and Italian hotheadedness shall be cooled in blood.

"'Well, now, America and the American press should use this experience as a mirror. What the result is when once war passions are become overwhelming. And America with all her varying nationalities may well be doubly careful. Since the Lusitania disaster one can see how among so peaceful a nation as the American the tendency is. What a one-sided presentation, to but express it mildly. What an overwhelming of the government and an assurance to the President that he take strong measures knowing the whole people are behind him, although this last might have an entirely different result. See, thus are wars made. Instead of seeing the matter from both sides and being careful, we arouse ourselves and the people, although there was in this instance plenty of reason to speak more mildly. What were the people doing on a boat loaded with ammunition sailing under an unfriendly flag in the war zone? They could just as well have been sitting on an ammunition wagon on the firing line. Far-reaching recklessness. And they would have us look surprised when everything blows up into the air. And from England, naturally, there is just the selfsame treachery as during the Boer war, whereby the wives and children of the Boers were placed before English cannon, to which the Calvinist referred to recently. But to all that we are blind, as also that if England shall accomplish her intentions, hundreds of thousands of women and children in Germany abiding in hopelessness shall die of starvation. About this cruelty which it has not been able to accomplish, but for which it is still striving, naturally nothing is said. Nor do we speak of the brutality

that we are not on account of patriotism, but only for a handful of gold manufacturing ammunition and all kinds of war materials by which the war is continued and thousands, and yet thousands are killed. Killed by American tools in a war in which America has no concern. For a handful of gold do these American citizens permit themselves to be used as murderers and at the same time with their mouths full of the brotherhood of men!

" 'And all this because the public is weak and poisoned and permits itself to be more and more aroused by the press. More and more one-sided sympathy is being nurtured, and from it one-sided acts result which mock all so-called neutrality, so that before we know it, we too shall sit in the midst of war.

" 'It is high time, therefore, that mighty protest be made against this one-sidedness and this whipping up of public sentiment to one side. So that something worse may not overcome us.

" 'Perhaps it would not be bad if such a protest went out from the thousands of descendants of the Holland nation, a nation which up to this time, although lying in the midst of the storm of the peoples engaged in the war, yet through God's goodness knows how to keep itself so wonderfully out of the war. We have a right to speak with the rest.

" 'Remembering your laudable appeal to the people for a day of prayer for the restoration of peace in Europe and a day of humiliation of ourselves before God Almighty that peace may be continued in our own country;

" 'We American citizens, believe that America's attitude of late is not entirely in accordance with the noble motive which directed you when you set apart the mentioned day of prayer and humiliation, because;

" 'Munitions and other instruments of warfare are sold in large quantities to one side of the belligerent nations; the public press is inciting public opinion of America against our fellow-men and spreading feelings of hatred towards a friendly nation; the Lusitania incident—however much we too deplore the loss of so many lives—is issued one-sidedly; besides other questions the fact does not seem to be taken into consideration that English merchantmen are said to be instructed to ram submarines and are rewarded for

accomplishing such; that in this way the submarines are prevented from investigating a hostile vessel; that merchantmen also are really used as instruments of warfare; not to say that a Christian nation as America may not allow the plans of the starving of millions of innocents by a nation befriended to us.

" 'We therefore earnestly ask you to use your power to do everything possible that the feelings of prayer and humiliation set forth by your note of November, 1914, may continue in our nation, that exportation of ammunition and instruments of warfare may be prohibited, the propagation of hostile utterances in public life be restricted, the investigation of the Lusitania incident be allsided, and the dealing with other nations be done in the spirit of peace.

" 'We, American citizens of Holland descent, beg to be allowed to submit the above to your consideration. We do so the more freely as descendants of a neutral people.

" 'Most faithfully and respectfully.' "

The learned trial judge instructed the jury that the particular language used by defendant was in and of itself libelous and, unless privileged, implies both damage and malice, and upon the subject of privilege, entered into at length in the charge, said, among other things, after reviewing the alleged libelous article, that the comments and conclusions relate to public matters—

"and, therefore, constitute a qualified privilege, according, as you may determine the question as to whether or not there was express malice in publishing them";

—and said that the burden rested upon plaintiff to prove express malice. Upon the subject of justification, the jury was told:

"It is for you to say under the evidence in the case whether the limits of fair criticism were transcended by the defendant company under the facts and circumstances disclosed by the testimony in this case.

"It is for you to say whether the defendant com-

pany was justified in publishing the alleged libelous article by reason of what had gone before, including the conduct of the plaintiff, as disclosed by the evidence."

OSTRANDER, C. J. (*after stating the facts*). The considerable reference which has been made in the foregoing statements to the points presented upon the former appeal and to the opinion delivered is made partly because of the use made in the briefs and in the opinion of the words justified and justifiable, partly to show the theories of counsel presented on the first appeal, and partly because it is a contention now made by counsel for plaintiff that this court, by its opinion, left to be determined upon a new trial (upon the same facts) only the question of damages, while the counsel for defendant say that the trial court correctly read the opinion as holding that on a new trial the questions directed to be submitted to the jury were:

(1) "Whether or not the limits of fair criticism have been transcended," and
(2) "The question of justification."

It is clear that the article complained about is either a libel (actionable defamation), or it is fair comment. Plaintiff says it is actionable defamation; defendant, in substance and effect, that it is fair comment. The lower court, upon the first trial, held that the article was not libelous, and then, and illogically, if the term justified is used with its technical meaning, that the defendant was justified in publishing the article. This court held (1) that the words employed were libelous, and (2) that whether they were justified—excused, warranted—because they were fair comment, was a question for the jury. Unless we did then, and do now, wholly misapprehend the case presented by the pleadings and the proofs, then, allegations of minor

errors aside, no other points of law were then, or are now, involved in a proper determination of the main question presented by the record. No separate question of justification or of privilege, giving these words their technical meaning, is presented, and we do not read the notice, given by defendant, of special defenses as raising these questions; we do read it as presenting, with the plea of the general issue, the contentions that the language is not libelous and, if it is, that all that was published was fair comment and therefore not actionable.

Plaintiff cannot be heard to say that what he himself published and circulated was not matter of public interest, because he addressed the public upon a matter of current public concern, criticising action of public officials and advocating certain action of public officials. What he published therefore invited, or at any rate excused, comment and criticism from those who held other views. Plaintiff, however, is not a public officer, nor a candidate for office, but is a person who had the legal right to frame and circulate a petition to the President of the United States, and to comment, fairly, upon governmental policies and actions. Good taste might well have influenced him, in view of his status, to omit the particular activity, and his status, if known, would be likely to qualify his arguments; but his legal right cannot be denied. Defendant commented upon and criticised what plaintiff had published and criticised his political activity, and in doing so used language about him personally which we held, and now hold, to be libelous *per se;* of such a character as to require the court to advise the jury that unless defendant's contention that it was fair comment was made out it imputed malice and injury.

The *onus* is on plaintiff, where a defense of fair comment is raised, just as in any other case, to show

that the words are reasonably capable of being understood as a libel on him, and it is for the judge to say whether the published article is capable in law of being a libel, *McQuire* v. *Western Morning News Co.*, L. R. 2 K. B. Div. (1903) 100, 111, and the court having determined this point favorably to the plaintiff, then whether the words complained of are, or are not, fair comment is essentially a question for the jury. *Campbell* v. *Spottiswoode*, 3 B. & S. 778, 32 L. J. R. Q. B. 185; *Merivale* v. *Carson*, L. R. 20 Q. B. Div. 275.

"Fair comment does not negative defamation, but establishes a defense to any right of action founded on defamation." Per Buckley, L. J., in *Walker & Son* v. *Hodgson*, L. R. 1 K. B. Div. (1909) 239, 253.

"It is precisely where the criticism would otherwise be actionable as a libel that the defense of fair comment comes in." Per Lord Loreburn, L. C., in *Dakhyl* v. *Labouchere*, L. R. 2 K. B. Div. (1908) 325, 327.

See *Cooper* v. *Stone*, 24 Wend. (N. Y.) 434; *Dowling* v. *Livingstone*, 108 Mich. 321 (32 L. R. A. 104); Newell on Slander and Libel (3d Ed.), chap. 20, p. 686 *et seq.*; Fraser's Law of Libel and Slander (5th Ed.), art. 24, p. 155 *et seq.*

In making the defense of fair comment, defendant had no benefit of privilege, in the sense in which the learned trial judge used the term in advising the jury; no privilege attaches to a newspaper in such a case, and the liberty of the press, unless affected by statute, is no greater and no less than the liberty of every citizen. *McAllister* v. *Free Press Co.*, 76 Mich. 338; *Bee Pub. Co.* v. *Shields*, 68 Neb. 750 (94 N. W. 1029, 99 N. W. 822). Although some eminent judges have used the word "privilege" to describe the public right of fair comment (Gray, C. J., in *Gott* v. *Pulsifer*, 122 Mass. 235, 238, 239), *bona fide* comments on matters of public interest are not privileged; because it is the right of every one, not the privilege of any particular

one, to comment fairly and honestly on any matter of public interest, and the defense of fair comment is equally applicable whether the criticism be oral or written. One distinction between fair comment and privileged communications is that in the latter case the words may be defamatory, but the defamation excused or justified by reason of the occasion, while in the former case the words are not defamation of the plaintiff and hence not libelous, the stricture is not upon the person himself but upon his work—upon what he has said or has written. Another distinction is that if criticism or comment is privileged, strictly, the plaintiff would in every case be required to prove actual malice, however false and however injurious the strictures, while the defendant would only have to prove that he honestly believed the charges he made; and this is not the law.

Clearly, the court was in error in instructing the jury that there was involved any question of qualified privilege, in the sense in which the court used the term, and in advising them that plaintiff must prove express malice in order to recover. Quite as clearly, the court was not in error in refusing to charge, as requested to do by the plaintiff, that the only question for the jury was the damages sustained by the plaintiff. The jury should have been instructed that the article in question is libelous unless it is fair comment, and that whether or not it is fair comment was for them to decide, under instructions to be given them. If it was fair comment, plaintiff could not recover; if it was not, the rules to be applied in respect to the measure of recovery are those applicable to any other case of libel.

In view of the foregoing, it seems to us unnecessary to consider further and comment upon the charge of the court. However, it perhaps ought to be said that evidence of repetition of the libel before suit was

begun may be received in aggravation of damages, and repetition after suit begun and after a first trial may be proved as evidence of malice if the publication is not found to be, in fact, fair comment.

It was error to admit in evidence the article—editorial—headed, "Dr. Van Lonkhuyzen," printed on November 4, 1915, after the first trial of the cause was ended in the circuit court. It was offered and received as tending to rebut malice. The editorial reads:

"Dr. Van Lonkhuyzen.

"You have declared before our magistrates your intention of becoming an American citizen. It is no reflection upon your character, your intelligence nor upon your ideals that in your four years of residence in the United States you have not as yet been able to grasp the spirit of American patriotism in all its depths and fullness. You cannot understand in its entirety the American spirit until you become thoroughly imbued with it. You cannot understand the blessings of American citizenship until you have shared in them. An American court has impressed you with some of these essentials.

"We will welcome you as a citizen of our free country, as we welcome all men with Christian ideals. We will welcome you as we welcomed all men of leadership and achievements. We will extend to you the hand of freedom's fellowship in the thought and hope that you, when instilled with that spirit which moves America, will lend your many excellent qualities, your unquestionable high character and your intellectual endowment to the forces that have made American citizenship what it is."

It is said by appellee that the plaintiff had offered to show malice, various publications appearing in defendant's newspaper after the publication of the alleged libel, and that this article is—

"only another article of the same class tending to show that the defendant was not actuated by personal ill will against the plaintiff."

It might have been argued by plaintiff's counsel, the article being in evidence, that it was a confession that the original editorial and its repetition were designed by defendant, not as fair comment upon what the plaintiff had written and published, but to teach plaintiff himself a lesson, to personally humiliate him. We are of opinion that the court erred in receiving it. It is not of the "same class" as those offered by plaintiff. If regarded as favorable to defendant, it is self-serving evidence made by defendant in its own behalf.

The judgment is reversed and a new trial ordered, with costs to appellant.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

GAFFNEY v. GOODWILLIE.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—PERSONAL INJURIES—APPEAL AND ERROR.

   On certiorari to review an award of the industrial accident board, under the workmen's compensation law, where there was evidence to support the finding of the board that plaintiff's decedent's death was caused by a fall while in defendants' employ, the award will not be set aside.

2. SAME—REVIEW.

   A finding of the board that defendants were negligent in reporting said accident, and had subjected themselves to the imposition of a penalty of $50 under section 17, part 3, of the statute, but no order imposing a penalty or levying a fine was made, will not be reviewed by this court, there being no order to be reversed or affirmed.

See notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

Certiorari to Industrial Accident Board. Submitted October 24, 1918. (Docket No. 82.) Decided December 27, 1918.

Ellen Gaffney presented her claim for compensation against James G. Goodwillie and David L. Goodwillie, copartners as Goodwillie Brothers, for the accidental death of plaintiff's husband in defendant's employ. From an order awarding compensation defendants bring certiorari. Affirmed.

James C. Wood, for appellants.

Virgil I. Hixson, for appellee.

PER CURIAM. The board of arbitration refused, two to one, to award compensation. Upon a review by the industrial accident board, the finding was reversed and compensation allowed. It is admitted that the claimant is widow of the deceased, John Gaffney, that John Gaffney was employed by Goodwillie Brothers, and that both the employer and employed were governed by the workmen's compensation law, that on October 20, 1916, John Gaffney suffered an accidental personal injury arising out of and in the course of his employment, that John Gaffney has since died, that if the claimant is entitled to compensation the award should be for 300 weeks at $5.77 per week. It is not admitted, but is denied, that John Gaffney upon the said occasion received any considerable injury, one that disabled him or resulted in his death. What happened, and the testimony is not in dispute, was, that in taking a board from a machine, another board following it through the machine pushed the board in Gaffney's hands with such force that he was obliged to step back from the machine, or was pushed back from the machine, against and over and upon a truck from which he fell or rolled to the floor. He

immediately arose and resumed work, without complaint except to say that his right hip was hurt. This was early in the forenoon. He worked the remainder of the day. He died December 29, 1916, having been ill from and after October 20, 1916. All the testimony supports the conclusion that he was a sick man on Monday, October 23, 1916, suffering acutely, and thereafter, with variations of acute symptoms, until he died.

Whether what happened to Gaffney at his work, on October 20th, caused his illness and death is the subject to which a considerable mass of testimony, medical and other, is addressed. In a lengthy finding and opinion, the board has set out its reasons for awarding compensation, in the course of which occurs the following:

"It is pretty difficult to say just how hard the man was struck, shoved or pushed, but the fact remains that he was struck, shoved or pushed and went backward three feet and fell upon a truck twelve or fifteen inches high and rolled over it and fell upon the floor. The board is convinced that the accident was a somewhat serious one, taking all of the testimony into consideration, and that it did injure the deceased very seriously and severely. * * *

"We are all satisfied that the factor which caused this man's death was the accidental, personal injury he received in the respondent's plant, on October 20, 1916. * * *

"In this case it is probably impossible to say, with absolute surety, what caused John Gaffney's death, but the board is satisfied that the most probable cause is the accidental personal injury he received in the employ of the respondents. That injury might or might not have caused the death of a young, strong, healthy, normal individual. Taking the testimony as a whole, the board is of the opinion that the accidental personal injury was the cause of his death."

And the board finds specifically:

"That on October 20, 1916, John Gaffney, deceased, suffered an accidental, personal injury, arising out of and in the course of his employment by being struck, shoved or pushed by a machine and a board, causing him to fall upon and over a truck and to the floor of the mill in which he was working.

"(c) That, as a result of said accidental, personal injury, he was disabled from and after October 20, 1916, until his death, on December 29, 1916."

We are concerned only to ascertain, it being asserted to the contrary, whether there is testimony supporting the finding and conclusion of the board. We are not all of us satisfied that we would reach the same conclusion; which, of course, is not the controlling thing. We shall not set out the testimony. Any analysis of it leaves some ultimate facts to depend upon inferences. But it remains that Mr. Gaffney, a man more than 65 years old, was in fact diseased, suffering from an advanced stage of arterio sclerosis. He had been able to work, but to quote from the medical testimony:

"A person with arterio sclerosis, as I discovered upon *post mortem*, this man had had, would be more likely to be affected by a fall than if he was not suffering with that."

And again:

"A man suffering with arterio sclerosis in the advanced stage which we found in this man, must have a weak heart. He is living, more or less, in the balance and waiting for some cause to intervene to throw him in a state of acute illness, then, any trivial influence, whether exposure or whatever else it might be, might give him broncho-pneumonia or produce evidences of congestion of the kidneys or any other acute disease which takes these people off."

The testimony cannot be harmonized. We find ground for saying that the board had before it some evidence tending to prove that the fall which Mr. Gaffney had set up a train of physical disturbances,

affecting an existing pathological condition in such way as to cause his death. We, therefore, decline to set aside the award.

The board, at some length, enters into a discussion of the conduct of the employer and concludes:

"(*e*) That the respondents, without any cause or reason, failed and neglected to report this accident to the industrial accident board, in accordance with section 17, part 3, of the workmen's compensation law, and subjected themselves to the imposition of the penalty of fifty dollars ($50.00) mentioned in said section of the law."

The law provides that an employer who refuses or neglects to make the report "shall be punished by a fine of not more than fifty dollars for each offense." Counsel for appellants directs our attention to this finding of the board, discusses the facts relating to it and adds that "the imposition of a penalty upon defendants is wrong and should be reversed."

We are concerned only with the order made by the board, which makes no reference to the matter. The board has not imposed a penalty or levied a fine. Upon this subject, there is no order to be reversed or affirmed. We, therefore, do not regard the point as one for decision.

PEOPLE *v.* MILLER.

CRIMINAL LAW—INFORMATION—PURE FOOD LAWS—OLEOMARGARINE—LABELING—STATUTES.

In a criminal prosecution, evidence that defendant sold oleomargarine, or a substance resembling butter, artificially colored with annotta, without labeling the same as required by section 1, Act No. 63, Pub. Acts 1913 (2 Comp. Laws 1915, § 6395), is insufficient to sustain a conviction under an information charging violation of said act, since the definition of oleomargarine, which may be lawfully sold when properly labeled, under section 6 of said act, excludes artificial coloring matter, and if the substance which defendant sold had been labeled as provided in said act, the sale would still have been unlawful and in violation of Act No. 22, Pub. Acts 1901 (2 Comp. Laws 1915, § 6393).

Exceptions before judgment from Ingham; Wiest, J. Submitted October 17, 1918. (Docket No. 115.) Decided December 27, 1918.

Michael Miller was convicted of violating section 1 of Act No. 63, Pub. Acts 1913. Reversed, and respondent discharged.

James Harris, for appellant.

Alex. J. Groesbeck, Attorney General, *Lee H. Pryor*, Assistant Attorney General, and *William C. Brown*, Prosecuting Attorney, for the people.

Respondent was informed against, charged with violating section 1, Act No. 63, Pub. Acts 1913 (2 Comp. Laws 1915, § 6395), which provides:

"No person shall sell, expose or offer for sale or exchange, or have in his possession with intent to sell or exchange, any oleomargarine or other substance made in imitation of butter, and which is intended to

be used as a substitute for butter, unless each and every vessel, package, roll or parcel of such substance has distinctly and durably printed, stamped or stenciled thereon in black letters the true name of such substance, in ordinary bold faced capital letters, not less than five line pica in size; and also the name and address of the manufacturer, in ordinary bold faced letters, not less than pica in size."

The testimony for the people (none was introduced for respondent) tended to prove that an inspector of the food and drug department of the State called at respondent's store—was inspecting it—and found a quantity of what respondent called butter, on a platter, in rolls. Respondent told him that he bought it from a farmer. The substance looked like butter. Witness bought about a third of a pound of it, put his seal on it, and took it to the State analyst to be analyzed. There was nothing printed in the substance, stamped or stenciled on it, or on the package or roll, in black letters or otherwise. There was no sign in respondent's store that oleomargarine was sold there. The sample was analyzed. The analyst testified that it was oleomargarine, artificially colored with annotta. On cross-examination, the analyst said:

"This butter I analyzed was of a yellow color. I am positive that the only ingredient that gave it the yellow color was annotta, yes, sir. It was not butter fat. I didn't make an analysis for the ingredients, merely to determine that it was oleomargarine and not butter. The only purpose for which I made the analysis was to find out whether it was oleomargarine artificially colored. By oleomargarine, I mean something that is not butter, that it is a substitute and sold as butter. I did not find any cream or butter fat in this. I did not look for it."

The people having rested, respondent's counsel made the motion and argument here set out:

"May it please the court, I desire at this time to make a motion to quash the information and all pro-

ceedings, and ask that the respondent be discharged, for the reason that from the testimony given here and the case made by the prosecution, that this is not oleomargarine within the law. The definition of oleomargarine, as given by the statute of 1913, reads as follows:

"'All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, butterine, lardine, suine and neutral, intestinal fat and offal fat, made in imitation or semblance of butter or when so made, calculated or intended to be sold or used as butter or for butter.' [2 Comp. Laws 1915, § 6400.]

"But it does not include coloring matter, and when coloring matter is used in oleomargarine, it produces a substance or compound not recognized in the law as oleomargarine.

"Now, I desire to call your attention to the fact that this is not oleomargarine as recognized in the statute. As I remember, there have been three laws passed governing the manufacturing and sale of oleomargarine. The first was passed in 1899, regulating the manufacture and sale of oleomargarine or imitation butter; the next was passed in 1901. This was a statute to prevent deception in the manufacture and sale of imitation butterine. Now those two laws remained in force until the year 1913—we had two laws governing and regulating the manufacture and sale of oleomargarine or imitation butter.

"In 1913, which was the time the law was enacted, a new law was passed which repealed that of 1899, and the act of 1913 is practically a re-enactment of the law of 1899. Thus we have, at this time, two laws regulating the manufacture and sale of oleomargarine, that of 1901 and that of 1913. Now, I call your honor's attention to the fact that this case, as made by the testimony of the prosecution, comes under the law of 1901, which is an act to prevent deception in the manufacture and sale of imitation butter or oleomargarine. Citing authorities.

"This proceeding is brought under the wrong statute, and if respondent is liable at all, proceedings should be instituted under the law of 1901, and not under that of 1913."

The motion was denied, respondent excepted, the jury was charged and returned a verdict of guilty. In denying the motion, the learned trial judge said:

"The act of 1901 did not prohibit the sale of oleomargarine in a separate and distinct form or in such manner as would advise the consumer of its real character, free from coloration or ingredient that caused it to look like butter. The respondent in this case is not charged with any offense under that statute. The statute of 1913 is silent upon the question of whether there is color included or not and provides that a person making a sale of oleomargarine or other substance made in imitation of butter, shall inform the purchaser and deliver to the purchaser a separate and distinct label on which is plainly and legibly printed, stamped or stenciled thereon, in black letters, in bold-faced capital letters, the true name of such substance. This information charges the respondent with making a sale of oleomargarine without having durably printed, stamped or stenciled thereon, in black letters, the true name of such substance. The matter of coloration has nothing to do with this. The motion to quash is overruled."

The record is brought here upon exceptions before sentence.

OSTRANDER, C. J. (*after stating the facts*). Respondent is charged with having in his possession and with selling, not stamped, *"a certain mixture commonly known as oleomargarine."* The proof is that he sold a substance, not butter, but a substitute for it, artificially colored with annotta to give it a yellow color.

Section 6 of said Act No. 63 reads as follows:

"For the purpose of this act certain manufactured substances, certain extracts and certain mixtures and

compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, intestinal fat, and offal fat, made in imitation or semblance of butter, or when so made, calculated or intended to be sold or used as butter or for butter."

In *Jasnowski* v. *Judge of Recorder's Court*, 195 Mich. 269, a person was informed against, charged with selling a certain quantity of oleomargarine containing foreign yellow coloring matter which caused said oleomargarine to have the appearance and be in imitation of yellow butter produced from the pure milk and cream of the cow. The information was laid under the provisions of Act No. 22, Public Acts of 1901 (2 Comp. Laws 1915, § 6393), the first section of which reads:

"No person, by himself or his agents, or servants, shall render or manufacture, sell, offer for sale, expose for sale, or have in his possession with intent to sell, any article, product or compound made wholly or in part out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same: *Provided*, That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter."

The information was quashed upon motion of re-

spondent, the trial court being of opinion that Act No. 63 of the Public Acts of 1913 repealed the law of 1901. In reversing the ruling of the trial court, we held the acts not to be in conflict with each other, saying:

"The respondent may sell oleomargarine—the substance defined in the act of 1913—by complying with the conditions of the act, and may not sell oleomargarine containing an ingredient or matter not named in the statute of 1913, introduced for the purpose of coloring the substance to imitate yellow butter."

We said further:

"What oleomargarine is is defined in the law of 1913. The definition excludes coloring matter. If matter is introduced for the purpose of coloring it, a compound not recognized in the law as oleomargarine is produced."

And see *Bennett* v. *Carr*, 134 Mich. 243. What was said in *Jasnowski* v. *Judge of Recorder's Court* was not *obiter*. The conclusion could have been reached upon no other reasoning. The conclusion which was reached denied the contention that after the law of 1913 became effective it was lawful to sell oleomargarine artificially colored.

Both acts referred to are police regulations. They must be read and considered together. If we do this, it is apparent that respondent was not required to stamp or stencil the substance which he sold. Impliedly, he was forbidden to do so. If he had complied exactly with the law of 1913, he would still have made an unlawful sale. Indeed, he would have added deceit to deception, used a label in apparent compliance with one law to aid in the violation of another. The law of 1913 relates to the stamping and stenciling of a substance which when stamped and stenciled may be used, a substance defined in the act itself, a definition which excludes artificial coloring matter.

Applying what was said in *Jasnowski* v. *Judge of Recorder's Court, supra,* we are of opinion that the evidence did not sustain the information and that the conviction should be set aside and the respondent discharged.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

CARLISLE *v.* DUNLAP.

1. FORECLOSURE—MORTGAGES — INADEQUACY OF PRICE — STATUTORY FORECLOSURE.

   Inadequacy of price bid for mortgaged property at the statutory foreclosure sale will not vitiate such sale if otherwise fair and regular, since the legislative act has determined the conditions on which rights shall vest or be forfeited, and the court cannot interpose conditions or qualifications in violation of the statute.

2. SAME.

   On appeal from the decree of the court below dismissing plaintiff's bill to set aside a mortgage foreclosure, in the absence of evidence of fraud, mistake, unfairness, or irregularity, the decree will be affirmed.

Appeal from Wayne; Collingwood, J., presiding. Submitted October 16, 1918. (Docket No. 62.) Decided December 27, 1918.

Bill by Jessie Carlisle against Mary E. Dunlap and others to set aside a mortgage foreclosure. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Thomas W. Payne (*George W. Coomer*, of counsel), for plaintiff.

William E. Baubie, for defendants.

OSTRANDER, C. J. The plaintiff borrowed $172.50 and to secure its payment executed a second mortgage upon certain real estate in Detroit to Mary E. Dunlap, as well as a promissory note, bearing interest at 4 per cent. per annum, payable monthly, due nine months after date. This was on May 26, 1914. She paid various sums, amounting in the aggregate to $75 —September 1, 1914, $60; April 16, 1915, $10; May 7, 1915, $5. The property mortgaged is familiarly known as No. 479, Military avenue, and was leased by the plaintiff to a tenant or tenants at a monthly rental. The first mortgage upon the property was for the sum of $1,700 and was held by the Wayne County and Home Savings Bank of Detroit.

In paragraphs 5, 6 and 7 of the bill it is charged, and is admitted in the answers—

"that on, to wit: the eighteenth day of September, 1915, said Mary E. Dunlap caused a notice to be published in the 'Detroit Courier' that default had been made in the payment of said mortgage by your oratrix, and there was due and owing on account thereof the sum of $105.41 and that pursuant to the power of sale contained in said mortgage, the said premises were to be sold to the highest bidder on the twenty-third day of December, 1915, at the southerly or Congress street entrance of the Wayne county building in said city of Detroit, pursuant to the statute in such case made and provided.

"6. That pursuant to said notice the sheriff of said county did offer said premises for sale at said time and place, and did sell the same to Donald D. Williams for the sum of $147.96; and did execute the usual sheriff's deed therefor.

"7. That afterwards on, to wit: the fifth day of January, 1916, said sheriff's deed, together with the evidence of sale, was recorded in the office of the register

of deeds for said Wayne county, pursuant to the statute in such case made and provided, in liber 1032 of deeds, on page 136, to which for greater certainty your oratrix begs leave to refer."

It is further charged (paragraph 9 of the bill) that the sheriff's deed and said foreclosure proceedings are wholly void, but no reason for this charge is given unless we infer that the reason is given in the preceding paragraph of the bill, in which it is charged that Mary E. Dunlap was not the owner of the mortgage on September 18, 1915, but had theretofore assigned it to another, who had in turn assigned an interest to still another person.

It is charged that plaintiff has tendered and offered to pay the full amount of the debt, which offer was refused. It is prayed that a decree be made that the said foreclosure proceedings are void, that plaintiff be permitted to deposit with the court the amount due and owing on account of the note and mortgage, and that the mortgage be discharged. The bill was filed February 8, 1917, and is verified. The cause came on to be heard June 27, 1917.

The testimony being concluded, the learned trial judge said:

"The equities are all with Mrs. Carlisle. If there is any way in which I can give her a deed to this property I am going to do it, and if I cannot do it, I shall have to sustain the sale."

On October 24, 1917, a decree was entered dismissing the bill. Dated December 1, 1917, filed December 6, 1917, an order was made staying proceedings pending an appeal. Dated the same day and filed December 3, 1917, plaintiff claimed an appeal, notice of which was given to solicitors for the defendants, if it was given at all (there is no evidence of its service in the record), May 2, 1918, or at about that time, with notice, also, of the filing of a bond on May 2, 1918.

Later, on application to the Supreme Court, time for taking an appeal was extended to July 1, 1918. The case was settled and signed June 8, 1918.

In this court, plaintiff rests her right to a decree permitting her to redeem the premises upon grounds stated in the brief as follows:

"*First.* The inadequacy of the consideration for which the mortgaged premises were sold.

"*Second.* The method pursued in conducting the foreclosure proceedings, and in not notifying plaintiff that proceedings to foreclose the mortgage were pending, so as to afford her an opportunity to pay and discharge the mortgage.

"*Third.* The power of a court of equity to grant relief against forfeitures.

"*Fourth.* The right of redemption from foreclosures in general, and the time in which proceedings therefor may be instituted."

This presents a single ground, which is the inadequacy of the sum bid for the property at the foreclosure sale, and this ground is not asserted in the bill of complaint. At the hearing, the testimony for plaintiff being concluded, counsel for plaintiff was asked by the court: "On what ground, Mr. Payne, are you seeking to have this set aside?" and he replied, "On the ground that Mrs. Carlisle had not received notice." Assuming that the bill may be ordered to be amended in this court so as to assert the ground for relief now relied upon, and any other ground which the testimony has disclosed, we are, in examining the first proposition, confronted with the rule that inadequacy of price cannot vitiate such a sale, if otherwise fair and regular. The reason for the rule is stated clearly by Mr. Justice CAMPBELL in *Cameron v. Adams*, 31 Mich. 426, 428. He said:

"If the sale had been made under the decree of a court, the authorities cited on the argument would bear very strongly in favor of relieving complainant.

Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy, and is familiar and elementary."

It is not now contended that this sale was not fair and regular. If we were to go farther and to examine the facts disclosed, it would appear that plaintiff had a home and address at 479 Military avenue, and that it was the address she gave to the agent of the mortgagee when she borrowed the money. It would further appear that as early as March 17, 1915, a letter addressed as above was written and sent to plaintiff, informing her that the mortgagee had placed the note given with the mortgage in the hands of attorneys for collection with instructions to foreclose the mortgage immediately and that the matter would be held until Monday, March 22, 1915. On April 1, 1915, plaintiff by letter excused herself for not calling upon the attorneys; on April 10, 1915, they wrote to her to the effect that they would hold the matter until the 15th instant, when, not having heard from her, they should institute proceedings. Plaintiff then paid $10 on the debt—she left the money at the office of the attorneys, who acknowledged receipt of it in writing and said they should expect at least $10 on the 1st and 15th of each month until the debt was paid. Under date May 12, 1915, plaintiff wrote that she had been very sick.

"I don't know what to say about the payment I promised to pay. I do wish you could stand that lady

off for a while until I get the necessaries straightened up. I'm not going to be so poor all the time and I'll make it all right with you. Fix it up some way & just so soon as get around to it, I'll call to your office. Trusting everything will prove out all right, I remain."

Receipt of this letter was acknowledged and it was said in the letter that a payment of $15 on or before June 1, 1915, was expected, and, if not made, foreclosure would be begun on that date. Following this, letters were written and sent to her August 3, September 1, December 30, 1915. In the letter last mentioned, she was notified that on December 23, 1915, the premises were sold by the sheriff under the power of sale in the mortgage, notice of the sale having been published in the Detroit Courier; that the premises were sold for $147.90; that she might redeem by paying that amount to the register of deeds, otherwise, etc., etc. On January 8, 1917, plaintiff having done nothing in the premises, a letter was addressed to her tenant, notifying him to vacate the premises. Again, on January 25, February 3, and February 20, 1917, letters were written to the said tenant, arrangement having been made with him to pay rent at $30 per month. In January, 1917, suit was instituted before a circuit court commissioner to obtain restitution of the premises. Plaintiff and her tenant were both summoned. Plaintiff has never made a tender of the amount due upon the mortgage or of the amount for which the premises were sold. She testified that she had never received some of the letters which are above referred to, and her tenant testified that they had not been delivered at 479 Military avenue. But the testimony on the part of defendants is that each letter was addressed as above stated, that the envelopes bore the return card of the office from which they were sent, that they were mailed in due course and were

not returned. We may say, therefore, there is no evidence of fraud, mistake, unfairness or irregularity. On the other hand, money has been expended upon the property by the purchaser at the sale, taxes and the interest on the first mortgage have been paid. Repeating the language of Mr. Justice CAMPBELL:

"Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. * * *

"The case is one of much hardship, and it is much to be regretted that the complainants have been deprived of their estate by the rigorous effect of provisions which take no account of misfortunes. But courts of equity cannot assume any censorship to condemn parties for doing what the courts cannot prevent. They can only redress wrongs within their jurisdiction."

The decree must be affirmed, with costs to appellees.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

MONGER *v.* MONGER.

1. CANCELLATION OF INSTRUMENTS—PARTIES—INTEREST IN SUBJECT-MATTER.

Where grantor, a man nearly 80 years of age, conveyed a farm, all the property he owned, to his grandchildren, without consideration, which they have since mortgaged

and are attempting to sell, a son of said grantor has no such expectancy, reversionary interest, or interest in remainder as to constitute an interest in the subject-matter of the suit entitling him to file a bill to set aside said deed, for an accounting, and to restrain defendants from disposing of the land.

2. SAME—EQUITY—JURISDICTION—DELAY IN PROSECUTING APPEAL. While a court of equity might retain the bill as an injunction bill only until the final determination of a pending inquisition to determine the grantor's mental competency, upon the single ground that in the event of threatened dissipation of said property plaintiff and his sister would be liable in law for the support of their father, where there has been ample time to conclude said inquisition, and a delay of about a year in bringing the cause on for hearing, on appeal from the order of the probate court, the bill will be dismissed.

Appeal from Berrien; Bridgman, J. Submitted October 22, 1918. (Docket No. 99.) Decided December 27, 1918.

Bill by Joseph H. Monger against Esther E. Monger and others to set aside a deed, and for an accounting. From an order denying a motion to dismiss, defendants appeal. Reversed, and bill dismissed.

Cady & Andrews, for defendants.

OSTRANDER, C. J. Henry R. Monger, widower, is father of Joseph H. Monger and Mary E. Foster, and grandfather of Esther E., Dwight M. and Vera M. Monger, who are children of a deceased son. These are the only heirs at law of said Henry R. Monger. Henry R. Monger was 80 years old in November, 1916. He owned a small farm—some 31 acres—worth some $6,000. He owned and owns no other property. This land he conveyed by warranty deed, May 6, 1916, to his said grandchildren, and they recorded the deed.

The grandchildren have listed the said land for sale. They have mortgaged the land for $756.81 and are dissipating the money. If the land is sold, the money received therefor will be squandered and the aged grantor become a charge upon the public or upon his children. No consideration was given for the conveyance or for the land by the said grantees. The said grandchildren lived with their grandfather upon the farm, but in December, 1916, they moved said Henry R. Monger from the farm into the city of Benton Harbor, where he lives, sick and confined to his bed, in the home of his said grandchildren. It is believed that the said grandchildren conspired together to persuade and induce the said Henry R. Monger to convey the said farm to them and by persuasion and influence overpowered his weak and feeble mind so that he made the said conveyance, although his living children and he are and have been upon good terms and no reason is known for his action in so conveying away his property.

The facts above stated appear in a bill of complaint filed December 26, 1916, by Joseph H. Monger, son of said Henry R. Monger, who prays that the said deed may be set aside and held to be void and the grantees therein be made to account to the grantor and plaintiff and his sister for all property and moneys which have come into their hands by reason of the premises and that they be meantime restrained from disposing of the land.

Additional facts charged in the bill are that in July, 1916, the daughter of the said grantor applied to the probate court for the appointment of a guardian of the person and property of Henry R. Monger, alleging in her petition that he was mentally incompetent to manage his affairs; that there was a hearing, upon which the petition was dismissed and an appeal was taken to the circuit court from the order of the

probate court and is pending. There is no averment touching the ages or pecuniary responsibility of the grandchildren. It is assumed that they are not infants. The grandchildren made defendants in the bill moved to dismiss it upon the ground that the plaintiff, upon the face of the bill, has no interest in the subject-matter of the suit and is not entitled to the relief prayed for. Coming on to be heard, the motion was overruled July 25, 1917, as was also a motion to dissolve the injunction, and plaintiff was given 15 days in which to file an amended bill and make the guardian of Henry R. Monger a party to the suit. No costs were given. The demurring defendants have appealed from this order, leave to do so having been granted by this court. No brief for plaintiff has been filed; the cause was submitted without argument.

Recognizing the rule that a plaintiff must have some interest in the subject-matter of the suit he begins, the learned trial judge was of opinion that here such an interest might be an expectancy, a reversionary interest, or interest in remainder, and that upon the allegations of the bill the heirs of Henry R. Monger had a direct interest. We cannot agree with this. There is a single ground upon which a court of equity might retain this bill as an injunction bill only until the final determination of the pending inquisition, and that is that in the event of threatened dissipation of the property the plaintiff and his sister would be liable in law for the support of their father. We have considered whether such an order ought to be made. We have said that the bill was filed December 26, 1916, the order appealed from made July 25, 1917. The case was settled October 29, 1917, and the printed record received by the clerk of this court November 16, 1917. Not until the October term, 1918, was the cause brought on for hearing. There has been ample time

to conclude the inquisition begun in probate court and pending in the circuit court when the bill was filed.

We conclude that an order should be entered reversing the order of the court below and dismissing the bill, appellants to recover costs of this appeal.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

SCHANNING *v.* STANDARD CASTINGS CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERSONAL INJURIES—HERNIA—ACCIDENTAL INJURY.

On certiorari to review an award of the industrial accident board, under the workmen's compensation act, where there was evidence to support the finding of the board that plaintiff was accidentally injured in defendant's employ, while pulling a truck, causing a rupture, the award of the board will be affirmed.

Certiorari to Industrial Accident Board. Submitted October 18, 1918. (Docket No. 88.) Decided December 27, 1918.

Carl Schanning presented his claim for compensation against the Standard Castings Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the General Accident, Fire and Life Assurance Corporation, Limited, insurer, bring certiorari. Affirmed.

Thomas A. Lawler and *John F. Berry,* for appellants.

See notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

OSTRANDER, C. J. The award was ten dollars a week for nine and one-half weeks and hospital and medical expenses incurred in the first three weeks. Plaintiffs in certiorari say there was no competent evidence before the industrial accident board from which it could find that an accident which arose out of and in the course of claimant's employment happened; that there is no competent evidence that claimant received an injury from the alleged accident or that his alleged disability resulted therefrom.

Claimant says he was injured October 31, 1917. His employer, on November 1, 1917, reported to the board that claimant was involved in an accident, the nature of his injury being a rupture, "Lifting Castings." A second report was made by the employer November 14, 1917, in which it is stated that the

"Cause and manner of accident, was trucking castings from foundry to rattler room (castings slipping from truck, tried to hold same on, causing a rupture)."

The board found—

"That the unexpected dropping of the truck into the hole with the resultant jerk and unusual strain upon applicant, causing the rupture, constituted an unexpected, unusual and undesigned occurrence, also an unlooked for mishap and an accident within the meaning of the workmen's compensation act."

Claimant gave testimony through an interpreter. The interpreter's statements were:

"He says he was handling iron, called bulldog. Him and another fellow, and the iron was weighing between five and six hundred pounds. They placed it on a truck, and as the other fellow jerked the truck, he hurt his back. * * * After that, he could not work, and he went immediately to consult a physician. * * * He says the other fellow was pulling, and he was pushing, and the truck fell into a hole and that is what gave him the jerk."

Giving the name of the physician he consulted, and asked what was done for him, he proceeded:

"He says he took him to the drug store and bought him a belt, and after that he was going to him and taking treatments."

Inquired of about the position of the belt on his body, he said:

"He put it across his back and the side of his limb. He says he still has it on now."

Claimant returned to work January 5, 1918, and of the interim he testified:

"He says the doctor told him not to go to work any sooner, and he got kind of disgusted because he thought the belt wasn't good and he said he didn't want to give him another belt, and he says: 'If you want to go to work, you can go to work.'"

The physician was not examined, it being stated that he was in the army. Further testimony was given by claimant to the effect that he first felt pain in his back, then in his privates, that he was advised by the doctor to have an operation performed and refused to do so. When he was hurt he reported to his foreman, telling him he could not work and that he had hurt his back. Claimant made a statement December 5, 1917, which was written down by the one to whom it was made, in English, and was read to claimant by a German acquaintance in German, the friend undertaking to translate the English into German. This statement is to the effect that while picking up a casting from the floor to place it on a wheelbarrow he felt a pain in his back and stopped work and went home.

"When I stooped to pick this casting up, a sharp pain caught me in the back, and I couldn't straighten up; after I got straightened up, I went to the office to report, and then went to the doctor's office."

Claimant was examined with reference to this alleged statement and denied having given it as it reads. The man with whom claimant was working was a witness. He gave testimony corroborating that given by claimant except that it is his recollection that he was pushing the truck and claimant was pulling it. He testified that the truck dropped in a little hole "and raised him up like that." Upon being recalled, claimant testified, as the record is understood, that he was pulling "and the other fellow was pushing."

It is the province of the board to weigh evidence and draw inferences therefrom. We cannot say there was no evidence to support the finding. If, in pushing or pulling the truck by its handles, one or more of its wheels dropped into a hole, jerking claimant in such a manner as to cause a rupture, it was an accidental injury. *Robbins* v. *Original Gas Engine Co.*, 191 Mich. 122.

The award is affirmed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

McGRATH v. McGRATH.

CANCELLATION OF INSTRUMENTS—MORTGAGES—HUSBAND AND WIFE—EQUITY.

Where defendant husband, in partnership with his son, sold his interest in the business to the son, the latter assuming a certain debt as part of the consideration of the purchase, but failed to pay the debt, defendant never having been released by said creditor, and the wife voluntarily gave

a mortgage on property which she owned to satisfy said debt, without taking an assignment of the demand against the husband, the mortgage is valid in the hands of the latter, to whom it was assigned, and the wife cannot maintain a bill to have the same annulled, no duty, no enforceable equity in the premises, arising from the marital relation, and plaintiff is in the same position she would be if she were not the wife of defendant.

Appeal from Gogebic; Cooper, J. Submitted October 11, 1918. (Docket No. 48.) Decided December 27, 1918.

Bill by Mary E. McGrath against John McGrath to annul a mortgage. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Herbert M. Norris, for plaintiff.

James A. O'Neill, for defendant.

The bill is filed to annul a real estate mortgage and the notes evidencing the debt secured by it, and to compel the assignee of the mortgage to discharge it of record. The answer of defendant says that plaintiff does not own the mortgaged property, claims the benefit of a cross-bill, and for relief asks that plaintiff be decreed to convey the land to him, although it is admitted that plaintiff has the legal title to the premises. The plaintiff is wife of the defendant, and most of the facts are not in dispute. The story told by the evidence may be related in few words.

The defendant was in business as a blacksmith and otherwise at the city of Ironwood in the month of April, 1909, at which time he turned his business over to his adult son, upon the agreement that the son was to pay $739 for the stock and $50 a month rent for the property. Prior to that time, the son had no interest in the blacksmith business, but, under the style John McGrath & Son, was interested with his father

in the "log loader business." In the blacksmith business, the son worked for a salary. A part of the agreement made by the two in April, 1909, was that the son should collect the "log loader bills" and pay a certain debt owed to Nichols, Dean & Gregg, of St. Paul, Minn. This debt was for supplies, some for the blacksmith business, and owed by John McGrath, and some for the other business, owed by the said partnership. The exact proportions are not stated, but an agent and salesman of the vendors estimated that 90 per cent. of the unpaid account was the account of the partnership or of the son. The vendors did not know of the arrangement made by the father and son and never released John McGrath as debtor. There was enough money coming due on "the log loader bills" to pay the debt, and it was all of it collected. John McGrath went "west" and was gone two years and eight months. His son continued the blacksmith business, and was somewhat advised therein by his mother, the plaintiff, who looked to the business, to some extent, at least, for her living. Nichols, Dean & Gregg were not paid and were pressing for payment of their debt. Under date July 18, 1911, plaintiff executed to them a mortgage upon certain premises, to which she had the legal title, to secure the payment of $565.29, with interest, payable in installments, according to seven notes which she made. This mortgage defendant acquired from the mortgagees in March, 1914, taking an assignment thereof to himself and recording it. This is the mortgage which plaintiff seeks to have discharged.

The real estate described in the said mortgage is the north 40 feet of lot 11, block 31, plat of the city of Ironwood. In her bill, plaintiff charges that she is owner in fee simple of lot 11, block 31, city of Ironwood. The testimony for plaintiff shows a warranty deed of the south 100 feet of said lot to John McGrath

and Mary E. McGrath, his wife, and a warranty deed of the north 40 feet of said lot to John McGrath. There follows in the chain of title, as recorded, a quitclaim deed from John McGrath to Mary E. McGrath of said north 40 feet of said lot, which was recorded February 7, 1903, a quitclaim deed executed by John and Mary E. McGrath to John Francis McGrath, their son, dated October 1, 1902, conveying an undivided one-third interest in said lot 11, and a quitclaim deed from the son to John, his father, dated June 25, 1906, conveying said lot 11. It is the claim of plaintiff that the title to the north 40 feet of lot 11 is in plaintiff and of the south 100 feet she owns an undivided two-thirds interest, her husband, the defendant, owning an undivided one-third interest. This is the interest that defendant, in his testimony, claims in the said south 100 feet of lot 11.

We have found no testimony to that effect, but it appears to be assumed by counsel that the blacksmith business was carried on on the said south 100 feet of said lot 11, and it is the contention of plaintiff that she gave the mortgage in question to settle a demand which might have been enforced against said south 100 feet of lot 11. She testified that she supposed they (the creditors) could have closed the shop. She further testified:

"I gave the mortgage because I wanted to hold the property that they threatened to close up or take. Of course I considered that what was my husband's property was my property. We were partners, that is how I looked at it. I wasn't posted on the law."

No one disputed the validity of this mortgage in the hands of the mortgagees. Plaintiff says:

"The plaintiff claims that because the indebtedness of John McGrath and John McGrath & Son, was owing by said John McGrath, individually as to the amount contracted by him, while in business by him-

self, and owing by him as a partner of John McGrath & Son, for the whole of which said indebtedness the individual property of John McGrath was subject to levy and sale on execution at the suit of Nichols, Dean & Gregg, the said Nichols, Dean & Gregg never having been notified of John Francis McGrath's assumption of said indebtedness and never having accepted John Francis McGrath individually for the payment thereof, and because it was unknown to Mary E. McGrath that there was any dissolution of partnership between John McGrath & Son, or any assumption of individual liability on the part of John Francis McGrath for either the partnership indebtedness or the individual indebtedness of John McGrath, and that because the plaintiff gave the mortgage in question for the purpose of saving the rights of her husband in the south 100 feet of lot 11 and the buildings thereon, from levy and sale by Nichols, Dean & Gregg, for such indebtedness, that the finding of the court of the facts as they were found and the decree of the court was properly made and entered, and should be affirmed."

On the other hand, the defendant says:

"1. That under the agreement entered into between the defendant and his son, Francis McGrath, when the latter purchased the defendant's interest in the blacksmith and log-loading business in 1909, that he would pay the indebtedness then owing to Nichols, Dean & Gregg, and which promise was a part of the consideration for the transfer of the defendant's interest, it was, as between the defendant and his son, the latter's legal duty to carry out his agreement and pay that indebtedness.

"2. That plaintiff, having executed the mortgage at the request and for the benefit of her son, and for a debt which the latter had obligated himself to pay, the mortgage was supported by a sufficient consideration and was enforceable against her by the mortgagee, and the mortgage having been assigned to the defendant, he acquired all the rights of the mortgagee."

The court entered a decree in which it is found:

"The title to the north 40 feet of lot 11, block 31, of

the original plat of the city of Ironwood, at the time of the commencement of this action, and at the time of the hearing therein, stood in the name of the plaintiff, that the mortgage heretofore given by plaintiff to Nichols, Dean & Gregg, was given to secure an indebtedness, owing to the said Nichols, Dean & Gregg by John McGrath, and by John McGrath & Son, that the partnership between John McGrath and son was dissolved before giving of said mortgage to Nichols, Dean & Gregg, and that John Francis McGrath, son and one of the firm of John McGrath & Son, was to have assumed and paid the indebtedness of John McGrath and John McGrath & Son but that Nichols, Dean & Gregg were not advised of this arrangement and did not release John McGrath from such indebtedness. That such agreement was not known to Nichols, Dean & Gregg, neither was the same known to Mary E. McGrath, the plaintiff herein, that the mortgage given by the said Mary E. McGrath, to Nichols, Dean & Gregg was to secure the indebtedness above named and to prevent Nichols, Dean & Gregg from enforcing their claim against any property owned by John McGrath, that afterwards John McGrath paid Nichols, Dean & Gregg, the indebtedness aforesaid, and took an assignment of the mortgage, so given by the said Mary E. McGrath, to Nichols, Dean & Gregg, to himself, the said John McGrath, instead of having said mortgage discharged of record: and upon these facts, I find as a matter of law and equity: That John McGrath has no right to or interest in said mortgage by virtue of said assignment to him, and that the plaintiff, Mary E. McGrath, is entitled to have such mortgage discharged of record and her title clear from incumbrance thereof."

OSTRANDER, C. J. (*after stating the facts*). The case is a singular one. Counsel cite no adjudicated case in point, perhaps could not do so. We have found no case like it. Nor does counsel for the plaintiff point out the duty owed by defendant to plaintiff, performance of which will operate to cancel the mortgage in his hands. No duty, no enforceable equity in the premises, arises from the marital relation.

Mrs. McGrath is in no worse and no better position than she would be if she were not the wife of defendant. She did not pay his debt at his request, nor because her relations with him imposed upon her the duty to pay it. He provided for the payment of his debts. The fact that as between himself and his creditors, the debt not having been paid, he was liable to pay it, made the payment of it by her none the less her voluntary act. She might have had the demand assigned to herself and enforced it, in due season, against her husband and his property. She did not buy the demand, and we think it altogether improbable that she did not understand that as between her husband and her son the duty to pay the debt rested upon the son. We know of no rule which permits a court of equity to treat what was done as an equitable assignment of the demand against her husband, and no such idea is suggested by her counsel. And if such an idea was entertained, no action to enforce the demand in her hands could now be maintained unless the husband waived the operation of the statute of limitations. It may seem to be an ungenerous, an ungallant, thing that the defendant husband is doing, but we are impressed that the case, in law, is no different from what it would be if he were not her husband. And if he were not her husband, no one, we think, would contend that he had, in buying the mortgage, merely extinguished a debt which the holder of the mortgage might originally have forced him to pay. He does not own the mortgaged property, and there is therefore no merger. His intention to pay the debt is negatived. His right of recourse against the one who agreed to pay the debt is lost.

We feel constrained to reverse the decree and enter a decree here dismissing the bill, with costs.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

PEARSON *v.* WALLACE.

1. FRAUD AND DECEIT—CONSPIRACY—EVIDENCE—ADMISSIBILITY.
   In an action for fraud and deceit, with a count alleging conspiracy, based upon false representations to plaintiff by defendants as to the value of certain gas bonds accepted by plaintiff in exchange for a farm which he conveyed to one of the defendants, and in which transaction the other defendants profited, evidence as to statements and correspondence of one defendant, not in the presence of other defendants, was admissible, as tending to prove concert of action and similar false representations made by each of them to plaintiff.

2. SAME—EXPERT WITNESSES.
   Testimony by an engineer, who had made an appraisement of the property of the gas company a year or two before, as to the value of the property of the company, and therefore as to the value of the bonds, based in part upon a map in the office of the company, shown to him by the manager, was not objectionable as incompetent, irrelevant, or hearsay.

3. SAME—EVIDENCE—ADMISSIBILITY.
   Oral testimony that the property of the gas company was then in the hands of a receiver, who was operating the plant, was admissible for the purpose of showing whether the company was in possession of its property, and as bearing upon the value of its bonds, although not admissible for the purpose of proving the legality of the appointment of the receiver, which should be proved by the record.

4. SAME—BOOKS OF ACCOUNT—EVIDENCE.
   There was no error in admitting in evidence the books of the company, and in permitting a witness to testify to what was contained in them, for the purpose of showing the condition of the company and the extent of the business carried on by it, where an expert testified that they apparently showed all receipts and disbursements, also corporate meetings and what was done at them.

5. APPEAL AND ERROR—PARTY APPEALING—HARMLESS ERROR.
   Upon a record showing that only one of several defendants

appealed from a judgment against all of them, error in the court below in the rejection of evidence bearing on the separate defense of one of the defendants not appealing, will not be considered by this court.

6. TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.
There was no error in the refusal of requests to charge, where the court fully and carefully presented to the jury the issues and the governing law, embodying in his charge the substance of any request which ought to have been given.

7. SAME—NEW TRIAL—DAMAGES.
Evidence that plaintiff gave a valuable farm, worth at least $5,500, in exchange for bonds secured by property worth less than one-half the face value of the bonds, that it was represented to plaintiff that the by-products of the company which issued the bonds would pay operating expenses, while in fact there were no by-products of value, and the company had never earned enough to pay operating expenses and interest on its bonded debt, *held*, sufficient to support a judgment for plaintiff.

Error to Livingston; Miner, J. Submitted October 11, 1918. (Docket No. 35.) Decided December 27, 1918.

Case by George J. Pearson against Henry M. Wallace and others for fraud and deceit. Judgment for plaintiff. Defendants bring error. Affirmed.

James H. Pound and *Francis J. Shields*, for appellants.

Louis E. Howlett and *W. P. Van Winkle*, for appellee.

OSTRANDER, C. J. Plaintiff owned a farm of 120 acres in the township of Hamburg, Livingston county, which, in December, 1915, he conveyed by warranty deed to defendant George Gallup, for a recited consideration of $5,650. What plaintiff received for the land was eleven bonds, issued by the Iron Mountain

Light & Fuel Company, for $500 each, the sum of $150 being paid as a commission to the agent, defendant Whaley, who made the sale. Defendant Gallup soon mortgaged the land, but held the title for about a year, when he conveyed it to another. The Iron Mountain Light & Fuel Company is a Michigan corporation, organized in 1906, with a capital of $150,000, and $149,500 of the capital stock was issued to Alfred W. Glass for the transfer by him to the company of a franchise granted to him by the city of Iron Mountain, Michigan, October 23, 1905. The remaining 5 shares of stock seem to have been sold for $500 cash. Among the original incorporators was defendant Wallace, who seems to have been connected with the company in some capacity until some time in the year 1914. There was an early issue of bonds to the amount of $100,000. In 1912, there was a new issue of bonds for $125,000, used to retire the old issue and pay certain current liabilities, and in July, 1914, authority was given the company to issue $25,000 additional bonds. The bonds were secured by a mortgage of the company's property to the Union Trust Company, of Detroit, trustee. The records of the company show no sales of bonds at par and do show all bonds sold below par to net the company 80 per cent. of par, plus accrued interest. Less than $69,000 of the $120,500 received by the company for stock and bonds sold was invested in a plant. The remainder was expended in various ways. The books of the company do not show that its operations produced any net income; they do show that it never earned enough to pay operating expenses and interest upon its outstanding bonds. Testimony for plaintiff tended to prove that the reproduction value of the plant in December, 1915, was $65,500, and its appraised value $55,200. The bonds which plaintiff acquired were issued in 1912, due in 25 years, and call for payments

of interest January 1st and July 1st of each year. There is testimony tending to prove that each of them was at some time held by defendant Wallace. The rate of interest is 5 per cent. Interest coupons were, or are, attached.

It is said in the brief for appellee that—

"There had been a default in the payment of the interest, the company was being operated by the Union Trust Co. of Detroit,"

—but no reference is made to the record and we have not discovered to what time interest was paid. It does appear that at the time of the trial the property was being operated by the Union Trust Company. Plaintiff testified that—

"January 1, 1917, when the coupons became due, I went to Ann Arbor and clipped the coupons from the bonds and counted the coupons and the bonds, placed the bonds back in my deposit box and presented the coupons to the cashier; he told me there wasn't any use; that they had sent in some coupons and that they were returned. I had had no suspicion of the bonds up to that time."

From this and other testimony it is assumed that plaintiff was paid the interest on the bonds theretofore accruing, and this agrees with the conclusion stated in the brief for appellant.

It is the theory of plaintiff that defendant Whaley, a real estate dealer in Ann Arbor, with whom he had listed his farm for sale, defendant Hammond, who was a bond salesman and occupied offices adjoining to or near Whaley's office, George Gallup, to whom the farm was conveyed, and Henry Wallace, who paid the rent of the Hammond offices, were acting together, in an attempt, a successful one, to trade him worthless bonds for his farm. His declaration, which was filed in March, 1917, alleges that the said defendants, with

intent to cheat and defraud him and induce him to transfer his farm to them, or to one of them, and receive in exchange therefor the bonds of certain gas companies, or of one of them, made certain false and fraudulent representations to him. The alleged representations are set out and as made by all of defendants. This in the first count of the declaration. In the second count, conspiracy of the defendants is alleged, to accomplish the same purpose in the same way. Plaintiff, retaining the bonds, seeks to recover his damages, and asserted and insists that the measure thereof is the difference in the value of the bonds as represented by defendants and their actual value when plaintiff acquired them. That this is the measure of his damages is not denied.

The printed record shows a plea filed by defendant Wallace alone. This agrees with the return to the writ of error filed with the clerk of this court. The printed record and the said return contain no evidence that the other defendants were defaulted. They joined in suing out the writ of error, and, upon its face, the brief for appellant is filed for all of them. We consider the case as if defendant Wallace alone has appealed.

The testimony for plaintiff tends to prove a concert of action of the defendants and similar false representations made by each of them to plaintiff. At various times several of them were present when some of the representations were made. Defendants Gallup, Hammond, Wallace, and Whaley gave testimony which, if believed, tended to negative any actual concert of action and the making of false statements respecting the bonds and their value. Upon all of the testimony, the case was one for a jury as to the liability of all defendants, it was submitted to a jury, and a verdict for plaintiff for $4,408.59 against all defendants was returned, upon which a judgment for a

like sum was entered. A motion for a new trial was overruled, the denial excepted to, and in this court 43 assignments of error are presented.

A number of errors are assigned upon rulings admitting statements and correspondence of one defendant, not in the presence of other defendants, the exceptions being based upon the reason that a conspiracy had not first been proven. The statements themselves tend to prove concert of action. Plaintiff's testimony with other testimony tends to prove that the suggestion that a farm, listed with him to be sold for cash, be traded for gas bonds, came from Whaley, the real estate broker. Consideration of this suggestion brought Hammond and Wallace and Gallup upon the stage, not all at once, but in due season. That these defendants had with each other certain relations is not disputed. If plaintiff is to be believed, each exerted himself to induce in plaintiff the belief that the bonds were as good as cash. The warranted inference from plaintiff's testimony and from what actually occurred is that Wallace got rid of some bonds and in fact acquired an interest in the farm, while Whaley and Hammond divided a commission as upon a sale of the farm, and each cleverly supplemented the other by the representations made in the effort to bring about the exchange which was made. There is some testimony which supports the conclusion that each knew that the bonds were not what they were represented to be. But, however this may be, it is proven that they made representations respecting them which were in fact untrue, and a general verdict against all was returned.

It is assigned as error that an engineer was permitted to testify to facts based upon a map in the office of the gas company at Iron Mountain and to measurements, etc., the objection made to the testimony being that no proper foundation for its admis-

sion was laid and that it was incompetent, immaterial, irrelevant and hearsay. The witness was called to prove the value of the property of the gas company and, therefore, the value of the bonds. He had made an appraisement of the property of the gas company, in the year 1915, for the Grand Rapids Trust Company. He testified about the plant, buildings, etc., and said there was approximately nine miles of gas mains. It appears that he arrived at this conclusion from a map, a part of the records of the gas company, showing the situation and extent of its mains. The map, the witness testified, was shown to him by the manager, the man in charge of the company. The witness gave his opinion, his estimate of the value of the property, and stated the factors which he used. We find in the testimony nothing which is incompetent, irrelevant or hearsay. There may have been gas mains besides those indicated by the map. If so, it was a fact to be proven.

A witness was called by plaintiff who testified that the Union Trust Company was then receiver for the Iron Mountain Light & Fuel Company. The objection to the testimony was that it was incompetent and immaterial, and it is argued in the brief that the fact could not be shown by parol. He testified further that the Union Trust Company was in possession of the plant, operating it. To this testimony the same objection was made. This testimony was important as tending to prove, with other testimony, the value of the bonds. Technically, of course, the fact that a receiver of property has been appointed ought to be proved by the record. That is the best evidence. Whether a certain corporation is in possession of property may be proved by any one who knows the fact. Assuming that it was error to receive the testimony of the witness to the effect that the property was in the hands of a *receiver*, the judgment should

not therefore be reversed. The fact was not disputed. The essence of the testimony was, not the legality of the appointment of a receiver, but was that the trustee of the bondholders had, for some reason, taken possession of the property and was conducting its business.

Nor do we find reversible error in the rulings admitting the books of the gas company in evidence and in permitting a witness to testify to what is contained in them, with his mathematical calculations based upon what the books disclose. If a gas company keeps books, if, as an expert in this case testified, the books of account show, apparently, all receipts and disbursements of money, if they show corporate meetings and, apparently, what was done at the meetings, no reason is perceived for refusing to permit their contents to be given to a jury to prove the condition of the company and the extent of the business carried on by it.

The court was right in refusing at the close of plaintiff's case to direct a verdict for any of the defendants. The reasons for this conclusion have been stated.

It is complained that the defendant Whaley was not permitted to answer whether he had ever owned any of the bonds of this gas company. As affecting his own defense, it would seem that the question was a proper one and that he should have been allowed to answer, although we find no claim made that he ever owned any of the bonds or was doing more than aiding some one else to dispose of the bonds for the farm. As affecting the other defendants, and especially the defendant Wallace, the value of the answer or the prejudicial result of the ruling is not apparent. Defendant Whaley is not, upon this record, one who can question the judgment. In the only brief filed for appellants it is said,

"I insist that both these men, Whaley and Ham-

mond, are not connected with the defendant Wallace, whom I represent."

This is, of course, addressed by counsel to another point, but it confirms, what the record indicates, that it is Wallace alone who is rightfully appealing.

All other assignments of error based upon rulings admitting and rejecting testimony have been examined. We find no error in the rulings complained about.

Passing to assignment No. 25, it is:

"The court erred in permitting the jury to speculate as to the amount of damages resulting from the sale of the bonds alleged to have been sold upon misrepresentation by the defendants, as any representations relied upon as to the bonds could not be performed within one year of the making of the same and the amount being above $50, must be in writing, or plaintiff could not recover; and the bonds on their face show that they are not to become due and payable until twenty years and upwards from the time the representations were claimed to have been made and there would be no way of establishing their then value."

Of this it is said in the brief:

"Assignment 25 interposes the statute of frauds, which, as to the defendant Wallace, it seems to me, as well as all the rest of the defendants, is a complete defense. 3 Compiled Laws of Michigan 1915, § 11981, subds. 1 and 2, and cases cited. This error must be apparent."

It is not perceived that the statute referred to has any application here.

We have read the requests to charge preferred on the part of defendants and the charge of the court. Without setting them out here, we content ourselves with saying that the charge was a full and careful presentation of the issues, and of the governing law, favorable in some respects to defendants. The substance of any request which ought to have been given

is embodied in the charge, the case is a simple one, the issues not complicated or obscure. That plaintiff gave a valuable farm in exchange for the bonds is admitted. The parties agreed upon a value of at least $5,500 for the farm. Undisputed evidence shows that the bonds were not worth par and had never been, that the company which issued them had never earned enough to pay operating expenses and interest on its bonded debt. There was testimony tending to prove that the property securing the issue of bonds was worth less than one-half the face value of the bonds. In addition there was testimony tending to prove that it was represented to plaintiff that the company which issued the bonds, which made water gas, which had no by-products of value, received enough for the by-products to pay operating expenses, that the bonds were as good as cash or as wheat in the bin, and were in this case somewhat difficult to secure. Assuming that the defendants were engaged, in concert, in getting rid of the bonds for the owner of them, what was said by each amounted, in the mass, to a cunning presentation of the singular advantages which the holders of such bonds possessed. Whether the claimed representations were made by one or several of defendants, whether they were false or true, whether plaintiff relied upon them to his injury, these questions the court submitted to the jury, plainly, with applicable rules for framing the verdict as the facts were found to be.

We find no reversible error, and therefore affirm the judgment.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

VAN ORMAN *v.* PUFFER.

GUARANTY—CONTRACTS—VIOLATION—RELEASE.

Where a brewing company contracted with a hotel company to allow certain rebates in the sale of beer, to apply on the payment of two notes owing to it by the hotel company, in case certain specified brands of its beer were sold exclusively in the saloons of said hotel company, and defendant, on the sale by him of the stock of said hotel company to plaintiffs, guaranteed to make good any deficit in case the rebates were insufficient to cancel the notes, if plaintiffs would faithfully perform the contract, evidence of a wilful violation of the contract, in the substitution of cheaper beer for the higher priced, for four months, thereby materially reducing the sales of beer, *held*, sufficient to release defendant, although the brewing company did not exercise its option to declare said contract violated.

Error to Jackson; Parkinson, J. Submitted October 16, 1918. (Docket No. 76.) Decided December 27, 1918.

Assumpsit by Fred Van Orman and another against Elmer C. Puffer for breach of a contract of guaranty. Judgment for defendant. Plaintiffs bring error. Affirmed.

Thomas M. Poynton, for appellants.

Sidney S. Gorham and *John F. Henigan*, for appellee.

The Victoria Hotel Company is an Illinois corporation with outstanding capital stock of the par value of $40,000. Under date January 28, 1910, the Victoria Hotel Company, by O. A. McClintock, its president, and O. A. McClintock personally, made an agreement with the Fred Miller Brewing Company, a Wisconsin corporation, in which agreement it is recited

that the hotel company and McClintock, parties of the second part, are jointly and individually the lessees of certain portions of a brick hotel building in Chicago known as the McCoy Hotel building, and that they have agreed to sell upon said premises domestic draught beer manufactured and sold by the Fred Miller Brewing Company, party of the first part, and to sell no other domestic draught beer upon the premises during the term of the agreement and upon the terms and conditions therein recited. The agreement on the part of the Fred Miller Brewing Company expressed in the instrument is to advance and lend to the second parties (the hotel company and McClintock) the sum of $10,000, to take two promissory notes of $5,000 each as evidence of the loan, due respectively May 1, 1915, and May 1, 1920, each of the notes to bear an indorsement to the effect that it is issued subject to the terms and provisions of the said agreement to sell to the second parties all of the domestic draught beer which they "may need, use, sell, consume, or give away upon the above described premises," at stated prices, the brand known as "High Life" at $8 a barrel, the brand known as Pilsener at $5.50 a barrel, and to sell to them also during the terms of the agreement bottled beer at 75 cents a dozen for small and $1.25 a dozen for large bottles, with the proviso that if at any time during the duration of the agreement the Federal internal revenue tax upon malt liquors is increased the increase shall be added to the said prices. The second parties agree that they will not purchase, use, sell, consume or give away upon the premises during the period of the agreement any domestic draught beer other than that manufactured and sold by the first party, and will purchase from the first party all that they may need, use, sell, consume or give away, and will purchase from the first party at least 60 per cent. of all the bottled beer used, sold, consumed or

given away upon the premises. They further agree that from and after May 1, 1910, they will maintain three saloons on the premises, two on the main floor and one in the basement, with the proviso that if any one of the saloons shall be operated at a loss during any six months' period they may discontinue the maintenance thereof.

"Parties of the second part agree that they will use in the two saloons and bars upstairs, exclusively, the grade and brand of beer known as 'High Life,' manufactured and sold by the party of the first part."

The agreement is to be in force until the second parties have purchased 5,000 barrels of "High Life" and 10,000 barrels of Pilsener beer, but not after the first day of May, 1920. While the agreement calls for payments to be made for beer in cash as it is delivered, it is a part of the agreement that whenever the second parties shall have purchased and paid for 2,500 barrels of "High Life" beer and 5,000 barrels of Pilsener beer, then, if they have also purchased from the first party 60 per cent. of all the bottled beer they have used upon the premises, the party of the first part will deliver up to the second parties the note for $5,000 due May 1, 1915. So it is provided that when the second parties upon the same conditions have purchased an additional 2,500 barrels of "High Life" and an additional 5,000 barrels of Pilsener, the party of the first part will cancel and deliver up the second $5,000 note due May 1, 1920. If, however, before May 1, 1915, the parties of the second part, having performed their agreement, have not purchased and paid for enough beer to secure the cancellation of the said notes in either of said periods they shall yet be entitled on the first of May, 1915, and on the first of May, 1920, to a credit of 66 2/3 cents a barrel for each barrel which they have purchased and paid for, said credit to be applied upon the said notes, and to a

further credit of a sum equal to 25 cents for each barrel of Pilsener beer in excess of double the number of barrels of "High Life" beer so purchased as aforesaid during the said periods. The parties of the second part agree to pay to the party of the first part the difference between the amount of the credits and the principal sum of each of said notes. If the parties of the second part purchase, sell, handle or give away on the premises domestic draught beer other than manufactured and sold by the first party (except in a case where the first party is unable to supply the beer)—

"For a period of ten (10) days after written notice from first party to discontinue the sale of such other domestic draught beer, then the notes hereinbefore referred to shall become at once due and payable."

The agreement is made binding jointly and individually upon the parties of the second part,—

"its successors and assigns, and his heirs, executors, administrators and assigns, and upon the successors and assigns of said first party."

A supplement to this agreement was made in another writing, dated the same day, namely, January 28, 1910, by which it is provided that if the parties of the second part sell a total of 7,500 barrels of beer during either or both of the five-year periods named in the original agreement, of which total more than one-third shall be of the brand known as "High Life," they shall be entitled to a credit of 66 2/3 cents for each barrel of beer sold. It is further agreed that in the event that the first note, due May 1, 1915, shall be surrendered and canceled as in the original agreement provided for prior to the date of its maturity, the parties of the second part shall be entitled to a credit upon the second note for all beer sold from and after the date of the cancellation of the first note.

Pursuant to this agreement, the Victoria Hotel Company and McClintock made two promissory notes,

dated January 28, 1910, by the terms of the first of which they promised to pay to the Fred Miller Brewing Company $5,000 May 1, 1915, at its office in Milwaukee, Wisconsin, with interest at 5 per cent. per annum after maturity until paid. The note is issued subject to the terms and provisions of a certain agreement made between the Fred Miller Brewing Company and the makers, dated January 28, 1910.

On September 22, 1910, the said Oliver A. McClintock and the defendant, Elmer C. Puffer, entered into an agreement in writing, in which it is recited that McClintock, the party of the first part, and his associates own the entire capital stock of the Victoria Hotel Company and have agreed to sell it to Puffer upon terms and conditions expressed in said agreement. The terms and conditions, in so far as they need to be stated, are that the party of the first part will transfer and deliver stock certificates representing the entire outstanding capital stock of the corporation and accept as payment $85,000, $40,000 in cash and $45,000 in deferred payments. It is a part of the agreement that the party of the first part, McClintock, will indemnify and save harmless the party of the second part and the Victoria Hotel Company—

"against any and all debts and obligations due and owing by said corporation for property or merchandise purchased and delivered, or services rendered or benefits received by said corporation prior to the hour of twelve (12) o'clock midnight on September thirtieth, A. D. 1910, and will pay, or cause to be paid, all such debts and obligations of said corporation; it being the intention of the parties hereto that upon the delivery to the party of the second part, of the capital stock of said corporation, on said thirtieth day of September, A. D. 1910, said corporation shall be free from debt, but shall remain liable upon all contracts made by it prior to said first day of October, A. D. 1910, by the terms of which any moneys shall become due and payable from and after said last named

date, for or on account of property or merchandise thereafter delivered or services thereafter rendered said corporation or benefits thereafter received by or accruing to it; provided, however, that all cash on hand, moneys in bank and all sums due and owing to said corporation, or to which said corporation may have become entitled prior to October first, A. D. 1910, shall belong to, and be the property of the party of the first part and his associates, as the owners of the capital stock of said corporation prior to said last named date."

The third paragraph of this agreement reads as follows:

"*Third.* In case the said Victoria Hotel Company shall faithfully comply with the terms of that certain contract with the Fred Miller Brewing Company, dated January 28th, A. D. 1910, and perform all the obligations imposed upon it by the terms of said contract according to the letter and spirit thereof, and shall be unable to sell such a quantity of draught beer as will, under the terms of said contract, entitle it to the cancellation of the two (2) notes for five thousand dollars ($5,000.00) each, mentioned in said contract, the party of the first part will, on demand of said Victoria Hotel Company and the party of the second part, pay to said Fred Miller Brewing Company such a sum of money as, added to the amount to which said hotel company shall be entitled as a credit upon said notes under the terms of said contract, shall be necessary to liquidate and pay said notes according to their tenor and effect; provided, however, that in case the said Victoria Hotel Company shall become entitled to the cancellation of said notes (either by partial payment in cash of the note first to mature or otherwise), prior to May first, A. D. 1920, the party of the second part shall pay, or cause to be paid to the party of the first part such a proportion of ten thousand dollars ($10,000.00) as the unexpired portion of the term of ten (10) years beginning May first, A. D. 1910, and ending May first, A. D. 1920, bears to the entire term of ten (10) years. To illustrate: if the quantity of beer sold under the terms of the agreement with said Fred Miller Brewing Company, together with any

moneys paid on account of the note first to mature, shall entitle the said hotel company to a cancellation of the second of said notes at the expiration of nine years from May first, A. D. 1910, then the amount due the first party hereunder will be one thousand dollars ($1,000.00)."

Under date September 30, 1910, in another writing, executed by McClintock and Puffer, there is the identical third clause of the original contract above set out.

By an agreement in writing, dated January 31, 1913, in which defendant Puffer is party of the first part and the plaintiffs parties of the second part, the defendant agreed to sell and sold to the plaintiffs all the issued capital stock of the Victoria Hotel Company, and the parties of the second part, the plaintiffs, agreed to buy said stock in accordance with provisions set out in the agreement, those provisions which are important here being similar to, for the most part identical with, the ones already set out and recited in the agreement by which the defendant became possessed of the stock and business of said corporation, that is to say: the defendant as party of the first part agreed to indemnify the parties of the second part and the Victoria Hotel Company against any debts or obligations owing by the corporation for property or merchandise purchased or services rendered prior to six o'clock p. m. on January 31, 1913, and to pay all such debts and obligations, and *second*, agreed that in case the Victoria Hotel Company faithfully complied with the terms of a certain contract with the Fred Miller Brewing Company, dated January 28, 1910, and should still be unable to sell such a quantity of draught beer as would entitle it to the cancellation of the two $5,000 notes, the party of the first part would on demand of the Victoria Hotel Company and the parties of the second part pay to the said Fred Miller Brewing Company such a sum of money as, added to the amount to which the said hotel company

was entitled as a credit under the terms of the contract, would be necessary to liquidate and pay the notes according to their tenor and effect. It is a part of said last mentioned provision:

"Provided, however, that in case the said Victoria Hotel Company shall become entitled to the cancellation of said notes (either by partial payment in cash of the note first to mature, or otherwise), prior to May 1st, 1920, the parties of the second part shall pay, or cause to be paid, to the party of the first part such a proportion of ten thousand dollars ($10,000) as the unexpired portion of the term of ten (10) years, beginning January 31st, 1913, and ending May 1st, 1920, bears to the entire term of 10 years. To illustrate: If the quantity of beer sold under the terms of the agreement with said Fred Miller Brewing Company, together with any moneys paid on account of the note first to mature, shall entitle the said hotel company to a cancellation of the second of said notes at the expiration of, to-wit: seven (7) years from January 31st, 1913, then the amount due the party of the first part hereunder shall be seven hundred and fifty dollars ($750)."

Plaintiffs were operating the hotel when the first $5,000 note made to the Fred Miller Brewing Company fell due, that is, on May 1, 1915. A settlement was made between the Victoria Hotel Company and the Fred Miller Brewing Company, according to which a credit was given upon said note for beer purchased, so that the balance due upon the said note was $1,402, and that sum the Victoria Hotel Company paid and the note was canceled. They asked defendant Puffer to reimburse them, and upon his declining to do so brought this suit.

Their declaration, which was filed August 26, 1916, contains the averment, among others, that the Victoria Hotel Company has faithfully complied with the terms of its said contract with the Fred Miller Brewing Company and performed all the obligations imposed upon it by the said contract according to the

letter and spirit thereof, but that the Victoria Hotel Company had been unable to sell such quantity of draught beer as would entitle it to the cancellation of its note, so that there became due and owing on the note on the first of May, 1915, $1,402, whereupon a demand was made upon defendant to liquidate said indebtedness in accordance with his contract with these plaintiffs; that the defendant neglected and refused to settle said indebtedness, whereupon, on the 3d of June, 1915, the Victoria Hotel Company paid the Fred Miller Brewing Company the said sum of money; that by reason of the failure of the defendant to perform his contract the assets of the Victoria Hotel Company have been depleted to the extent of $1,402 and the use thereof from the 3d of June, 1915, resulting in a depreciation in value of the 400 shares of the issued capital stock of said corporation purchased by the plaintiffs, "to plaintiffs' damage in the sum of two thousand dollars." To these allegations the common money counts in assumpsit are added.

The defendant with his plea gave notice of special defenses based upon the alleged violation by plaintiffs of the agreement of the Victoria Hotel Company with the Fred Miller Brewing Company, not all of which seem to have been relied upon at the trial, and only one of which, at the most two, were found by the trial court to have been sustained by evidence.

It is stipulated by counsel that the period during which the Victoria Hotel Company sold Pilsener beer at the upstairs bar of its premises is correctly shown by the records of the Fred Miller Brewing Company, to wit, from October, 1914, to February, 1915, inclusive.

Defendant gives notice with his plea that if the contract had been faithfully lived up to, and there was a shortage, he had a contract with McClintock which would authorize him to call upon McClintock

to pay the Fred Miller Brewing Company; that the plaintiffs were aware of this fact and, without authority from defendant or McClintock, after violating the contract with the Fred Miller Brewing Company, elected to pay an alleged claim of the Fred Miller Brewing Company, foreclosing both defendant and the said McClintock, without opportunity for either defendant or McClintock to be heard as against the said claim of the Fred Miller Brewing Company. One of the alleged defenses is:

"The plaintiffs, after they came into possession of the capital stock of the Victoria Hotel Company, in conducting the Victoria Hotel Company, without the consent of the said Oliver A. McClintock [or] of this defendant, changed from High Life Beer to Pilsener beer in one bar, when the revenue tax was raised fifty cents per barrel, they then took Pilsener beer instead of High Life beer."

The notice of special defense numbered 3 reads as follows:

"This defendant will further insist and show in his defense that the Victoria Hotel Company, during the time its stock was owned by the plaintiffs, breached the contract in the particulars hereinbefore mentioned; that the Fred Miller Brewing Company acquiesced in the breaches of the contract, for instance, the contract provided that Pilsener beer would be sold in the corner basement saloon only and High Life would be sold in the two saloons on the street level; instead of living up to this part of the contract, the Victoria Hotel Company, under the management of the plaintiffs, with the consent and acquiescence of the Miller Brewing Company, sold Pilsener beer in the Clark street barroom contrary to the contract, and by its action in this regard the Miller Brewing Company acquiesced in the violation of the contract and estopped itself from asserting the contract against the Victoria Hotel Company and was not legally entitled to be paid the $1,400 which the plaintiffs claimed to have paid it, and for that reason the plaintiffs cannot recover."

Other alleged special defenses seem to have been disposed of upon the evidence, leaving the one conceded failure of the Victoria Hotel Company to perform the contract as the sole basis for defendant's contentions and the court's conclusions.

The court as requested to do made certain findings of fact and conclusions of law. Proposed findings were submitted by counsel as well as points of law under the rule, a large number of exceptions were taken to the findings of the court, various amendments were proposed. There was a motion for a new trial made by plaintiffs, judgment having gone against them, and a new trial was refused. There are 26 assignments of error. It will be sufficient for an understanding of the issue to set out a part only of the findings of fact and the conclusions of law and to refer to the objections made thereto:

"8. It is conceded by stipulation on file that the Victoria Hotel Company (which is really the plaintiffs in this case), sold Pilsener beer instead of High Life, in the two saloons upstairs and for a period of about four months, from November, 1914, to February, 1915, both inclusive.

"9. Defendant contends this is such a breach of the contract with the Fred Miller Brewing Company, which plaintiffs were bound to abide by and perform according to its letter and spirit and for his protection and exoneration, as released him from or precludes plaintiffs from recovering from him any deficiency arising from insufficient sales of beer necessary to entitle him or plaintiffs to a cancellation of this $5,000 note now in question.

"The plaintiffs deny this contention and say it was not a violation of the real intent or meaning of the contract. That, at any rate, the defendant does not show he was damaged by it; that, in fact, he was not, and that the Fred Miller Brewing Company considered and treated the contract as having been faithfully performed. Plaintiffs' counsel insist this is, if a breach, one that, as it operated, was immaterial, entailing no loss and that defendant is not discharged by reason of it.

"10. Passing for the present the question as to whether it was such a breach on plaintiffs' part as releases defendant irrespective of proof of damage, and the question as to whom the burden of proof is upon to show damage or want of damage, I find the proofs upon this question, from the testimony of H. W. Borgman, bookkeeper for the Fred Miller Brewing Company, show that for October, 1914, there were bought by plaintiffs from that company, 23 barrels of High Life beer and 2 of Pilsener; in November, 19 barrels of Pilsener and 2 of High Life; in December, 23 barrels of Pilsener and apparently none of High Life; in January, 1915, 23 barrels of Pilsener and none of High Life; and in February, 1915, 25 barrels of Pilsener and 1 of High Life. The testimony shows that when the Fred Miller Brewing Company learned that plaintiffs were selling the Pilsener contrary to contract they required the practice to stop and the terms of the contract to be complied with.

"Following this, the sales of High Life for March were 28 barrels. The same figures are given for April.

"Preceding this period for months, the monthly sales of High Life have been from 33 to 47 barrels of High Life, except in September, 1914, when they fell to 24 barrels and in October to 23 barrels.

"I make the following table from the testimony of the bookkeeper:

"Sales of High Life beer:

	1913, bbls.	1914, bbls.	1915, bbls.
Jan.	33	37	0
Feb.	34	33	1
March	30	36	28
April	36	39	
May	33	40	
June	39	41	
July	51	47	
August	49	41	
Sept.	39	24	
Oct.	47	23	
Nov.	45	2	
Dec.	43		

"Sales of High Life are not furnished after March, 1915.

"Sales of Pilsener:

	1913, bbls.	1914, bbls.	1915, bbls.
Jan.	28	51	28
Feb.	27	40	28
March	27	43	29
April	36	46	36
May	42	41	
June	42	31	
July	36		
August	42	46	
Sept.	56	38	
Oct.	86	36	
Nov.	33	32	
Dec.	77	25	

"No figures are given for 1915 after April.

"If we consider sales of both kinds for November and December, 1914, and January and February, 1915, the aggregate is: for November, 34 barrels; December, 26 barrels; January, 28, and February, 29. For March, following the change back to contract terms, total sales of both kinds were 57.

"The only explanation for such diminished sales for these four months is the statement of Stowe that the business fell off; or that upstairs business was injured by the substitution of the cheaper beer, as counsel for the defendant claims; or that other beers not purchased of the Fred Miller Brewing Company were used; and I am not wholly satisfied, from the evidence, as to the real cause except that these diminished sales are coincident with the unauthorized change in handling these beers, and may be owing to that change and the proofs do not clearly explain them or show they were not due to it.

"11. I am not able to find, from the testimony, that defendant has not been damaged by the action of plaintiffs in violating the terms of the contract for four months. Not only were total sales diminished, but practically there were no sales of High Life, conditions not found for any similar period, and improved at once following a return to the contract requirements.

"12. Plaintiffs do not deny that for the four months mentioned, they violated the terms of the Fred Miller Brewing Company contract; that such company, when

informed of such violation, required its abandonment and a return to contract requirements, which were then complied with.

"13. I find, as doubtless already sufficiently appears, that the contract relations governing the parties and the Fred Miller Brewing Company are set forth in Exhibits A and B, defining their respective rights, duties and obligations.

"14. The declaration alleges that the Victoria Hotel Company, and meaning the plaintiffs also, has faithfully complied with its contract with the Fred Miller Brewing Company and has performed all the obligations imposed upon it by the terms of said contract, according to the letter and spirit thereof. Plaintiffs fail, by their proofs, to sustain this averment.

"15. The declaration also alleges that the plaintiffs have faithfully performed all the conditions of their said contract with defendant on their part to be performed. They also fail to prove this averment.

"16. I am unable to find that the greater weight of the evidence shows that the aforesaid violation of or departure from the terms of the contract as to the handling and sale of the two kinds of beer did not pecuniarily damage the defendant.

"If either party thinks I have omitted any material or necessary fact, I will supplement this finding of facts, if convinced I should do so.

"Conclusions of Law.

"I, therefore, deduce the following conclusions of law:

"1. That inasmuch as there is no claim or proof that defendant authorized such violations of the contract by plaintiffs, or that he has approved or ratified them or waived his rights to strict performance, the burden is upon them to show that he was not damaged thereby and is not entitled to defend therefor.

"2. That in the absence of clear and satisfactory proof to the contrary, the presumption is that his rights were thereby adversely affected, or, in other words, damage will be presumed.

"3. That the case is not different in point of law from what it would have been had plaintiffs and the Fred Miller Brewing Company expressly agreed to

change the terms of the contract for the period of four months aforesaid, and permit plaintiffs to sell as they did sell, defendant not knowing of such modification and not assenting thereto.

"4. That under his contract, defendant was entitled to a strict performance of it on the part of plaintiffs. That plaintiffs have broken the contract on their part, and not having shown, by a fair preponderance of the evidence, that defendant was not injured pecuniarily thereby, they cannot recover.

"5. Under the contract with defendant, it was the duty of plaintiffs to fully perform for him his contract obligations to the Fred Miller Brewing Company, and so far as such performance could do so, protect and exonerate him from pecuniary liability on account of it. His relation was, in a way, like or analogous to that of a surety for plaintiffs and he should only be called upon by them to make good in case after strict performance on their part the amount of sales or credits thereon should fall short of satisfying the claims of that company. Plaintiffs have paid the Fred Miller Brewing Company, and now seek recovery of such payment for the shortage arising from their failure to sell sufficient quantities of beer to cancel it under the contract. For their failure to carry out their part of the contract by not performing all its obligations according to the letter and spirit thereof, they are not in a position to call upon the defendant to make good the deficiency.

"6. They cannot ask defendant to be bound when they, themselves, have not been bound, their own delinquency not having been excused or justified or clearly shown to have been harmless.

"7. I think the same questions would arise and be confronted were it claimed that recovery could be had under the common counts and there is no better reason for awarding judgment for the plaintiffs upon those counts than upon the special count upon the express contract.

"8. That plaintiffs have failed to sustain their case either under their pleadings or the proofs, wherefore the judgment must be for the defendant.

"That judgment should be for the defendant for the amount of the set-off as stipulated and found in

my opinion on file with some additional interest since May 1st, 1916. It may be computed and here inserted. Three hundred ninety-three dollars and fifty-five cents ($393.55).

"In part support of these conclusions of law, I call the attention of the parties to 3 Elliott on Contracts, sections 2102 and 2103, which I believe controlling under the evidence in this case."

The amendment to the findings of fact made by the court is to the finding numbered 10, affecting only certain figures, the effect of the amendment not appearing to be of importance as affecting the issue to be determined.

Nor do criticisms of the findings of fact made by appellants appear to apply to anything which affects the question to be determined. There are some slight inaccuracies pointed out, but an examination reveals nothing requiring comment. What plaintiffs claim is stated in the brief in the following language:

"It was shown by testimony introduced by plaintiffs, and not disputed by the defendant, that the only time during which the Victoria Hotel Company sold Pilsener beer at its Clark street main floor bar, was during the period from October, 1914, to February, 1915, when it sold 91 barrels of Pilsener beer at its upstairs or main floor bar. Although the contract with the Fred Miller Brewing Company required that the Victoria Hotel Company use only the brand of beer known as 'High Life,' at the upstairs bar, yet, the brewing company, in its settlement with the Victoria Hotel Company allowed the hotel company credit of 66 2/3 cents for each of the 91 barrels of Pilsener beer so used at the upstairs bar, and did not consider nor treat this departure from the strict terms of the contract as a violation. However, the defendant insists, and the circuit judge held, that it was such a departure from the terms of the contract as amounted to a breach, even though no damage is shown to have resulted to the defendant.

"It is claimed by plaintiffs that this slight deviation from the strict terms of the contract with the

Fred Miller Brewing Company, which could injure no one but the brewing company, and which the undisputed testimony shows, resulted in benefit and no injury to defendant, on account of the greater quantity of beer for which the hotel company was given credit on its note, was not such a departure from the strict terms of the contract as the parties intended should operate as a forfeiture of plaintiffs' rights to insist upon the defendant paying the $1,402 which became due on the Fred Miller Brewing Company note, in accordance with his contract with plaintiffs when they purchased the capital stock of the Victoria Hotel Company, and that the clear weight of the evidence shows performance of the contract sued upon, by the plaintiffs, in every essential detail, and in accordance with the purpose and intention of the parties, as expressed in the contract and shown by the admitted facts in the case."

And the questions involved are stated to be:

"1. Whether from the language of the contract, as a whole, and the facts and circumstances in evidence, it can be fairly said that it was intended by the contracting parties that the slightest deviation, on the part of the Victoria Hotel Company, from any detail of its contract with the Fred Miller Brewing Company, whether resulting in damage to defendant or not, would operate as a forfeiture of valuable rights which plaintiffs acquired under their contract with defendant, and thereby enable the defendant to reap the benefits of the contract, and yet, through a technicality and unconscionable advantage, escape responsibility for an obligation which he assumed when he sold the property to plaintiffs, and received the benefits of the $85,000 purchase price paid by plaintiffs.

"2. Whether the common law rule of strict performance or the modern rule of substantial performance is applicable to the situation in the instant case, where it is not disputed that the plaintiffs have substantially, in good faith, fulfilled the obligations of their contract with defendant, in its essential particulars, and where the defendant has brought forward no proofs whatever to show that he has been damaged in any manner by reason of the slight variance from strict

performance, upon which he relies to defeat plaintiffs' claim.

"3. Whether the court erred in admitting the McClintock contract in evidence.

"4. Whether the court erred in placing burden upon plaintiffs to negative an affirmative defense where no evidence was offered in support of such defense.

"5. Whether the circuit court's findings of fact and conclusions of law are supported by the evidence."

OSTRANDER, C. J. (*after stating the facts*). There is no occasion for considering the fifth question, because the court's conclusions are based upon a conceded breach of the agreement, nor the third question, unless a new trial is ordered, because the court, although admitting the agreement between McClintock and defendant in evidence, based no conclusion and no material finding upon that evidence. The first, second and fourth questions demand some discussion: although the first two are stated in an argumentative manner, they nevertheless present points upon which appellants rely.

The Victoria Hotel Company was a party to the contract with the Fred Miller Brewing Company, a contract which, by its terms, might run for ten years, and which, so far as the record discloses, is still in force. The Victoria Hotel Company was a joint maker of the notes given to the Fred Miller Brewing Company. In their agreement they made provision for the contingencies of fire, injunctions, strikes, legal proceedings, restrictions upon the traffic in liquors and "any other unavoidable causes," and for the case which might arise if the hotel company premises were destroyed by fire or if, by the operation of a prohibitory liquor law, the selling of beer could not go on. In any event, wilful failure on the part of the hotel company to perform the contract after notice invited liability to pay the notes immediately and unavoidable failure to perform resulted also in immediate pay-

ment, but of the balance only after due credits were allowed.

The Victoria Hotel Company is not a party to any other of the contracts which have been referred to. It has remained, with McClintock, liable, primarily, to the Fred Miller Brewing Company upon the notes. Presumably, it had the advantage of the money furnished by the Fred Miller Brewing Company, or of some of it. But while the outstanding notes evidence a debt of the corporation, an analysis of the agreements clearly indicates that it was not a debt of the corporation which Puffer obligated himself to pay at all events. His undertaking is that if the hotel company shall faithfully comply with the terms of said contract, performing all of the obligations imposed upon it thereby,—

"and shall be unable to sell such a quantity of draught beer as will, under the terms of said contract, entitle it to the cancellation of the two (2) notes * * * the party of the first part will, on demand of the said Victoria Hotel Company and the parties of the second part, pay to the Fred Miller Brewing Company such a sum of money as, added to the amount to which said hotel company shall be entitled as a credit upon said notes under the terms of said contract, shall be necessary to liquidate and pay said notes according to their tenor and effect."

So, that, while it appears that the Victoria Hotel Company might, at the end of the first five-year period, settle, as it did, with the Fred Miller Brewing Company and pay it whatever sum was required to pay and cancel the first $5,000 note, and while such settlement would bind the Victoria Hotel Company and the Fred Miller Brewing Company, it would not necessarily bind the defendant, since the hotel company might be willing to pay cash rather than sell beer, and the Fred Miller Brewing Company be willing to waive strict performance of the agreement.

We are impressed that the parties stipulated for strict performance of the contract of the Victoria Hotel Company with the Fred Miller Brewing Company, although it is not necessary to a decision that we should go quite so far. It is not necessary because it appears that the breach of the agreement by the Victoria Hotel Company was not inadvertent, did not grow out of any mistake, but was wilful. It continued for a period of four months. There is evidence to support the finding that the result of the breach was diminished total sales of beer and, consequently, of credits to apply upon the note. The effects of the breach cannot be measured, limited, but were plainly considerable. The Fred Miller Brewing Company protested, and the Victoria Hotel Company resumed the sale of "High Life" beer in its first floor bar. It may be assumed that it was because it is difficult to determine the effects of a breach that the contract was drawn with so much particularity. "According to the letter and spirit" is the provision.

We think the learned trial judge committed no reversible error, and therefore affirm the judgment.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

STEEL FURNITURE CO. *v.* PEARCE.

1. TRIAL—OPENING STATEMENT—CONTRACTS—ACCEPTANCE—REJECTION.

In an action on a written contract for the sale of certain seats, defended on the ground that they were not the ones ordered by catalog number, and were not like those shown defendants in another theater, which plaintiff's agent represented they would be like, defendants' counsel had the right, in making his opening statement, to state his claim on the law as well as on the facts.

2. SAME—DIRECTED VERDICT—ESTOPPEL—PROOFS.

Where counsel stated in his opening that the seats were received and put up, but claimed the evidence would show that they were rejected within a reasonable time, defendants were not estopped from making their proofs, and the court below was in error in directing a verdict for plaintiff without receiving defendants' evidence, since the question as to whether the seats were rejected within a reasonable time might become one of law for the court, one of fact for the jury, or a mixed question of law and fact, according as the proofs might show. OSTRANDER, C. J., and BROOKE, J., dissenting.

Error to Wayne; Barton, J., presiding. Submitted October 9, 1918. (Docket No. 23.) Decided December 27, 1918.

Assumpsit by the Steel Furniture Company against George W. Pearce and another, copartners as Pearce Brothers, for goods sold and delivered. Judgment for plaintiff on a directed verdict. Defendants bring error. Reversed.

Woodruff & Woodruff and *Frank W. Atkinson,* for appellants.

Welsh, Rebout & Kahn, for appellee.

OSTRANDER, C. J. (*dissenting*). Suit was begun No-

vember 24, 1916. Plaintiff declared upon the common counts in assumpsit. Its bill of particulars is:

"1915. Sept. 17th—Purchase price of 538 No. 155 Bch. Ven. Mahogany fin. chairs at $1.19 each, $640.22. According to contract, interest 5 per cent."

Defendants pleaded the general issue with notice of the special defenses that in negotiating for the chairs they were shown a catalog representing No. 155, asked to see a sample chair, were taken to another theater where chairs were being installed and told that they were the same style as said No. 155, and, relying upon the representation, gave their order for the chairs, entering into a written contract therefor; that the chairs furnished to defendants are not the style and make shown in the catalog or in the other theater, are not suitable for the theater business, being lower and of inferior grade, with unfinished corners, and that patrons who used them complained because dresses were torn and injuries received on account of the sharp corners; that they were obliged to remove the chairs and substitute others; that the agent of plaintiff was notified to remove the chairs and the plaintiff notified that it had failed to supply the chairs as represented by its agent and made no reply for months.

The case coming on to be tried, the attorney for the plaintiff stated that the plaintiff would prove that the chairs were sold as stated in the written contract, were style No. 155 shown in a certain catalog at the time of the sale, were shipped according to contract, received by defendants, by them placed in their theater and used by them; that defendants at no time refused to accept them, but did accept them and had them in their possession and had not paid for them. Thereupon the attorney for defendants stated, among other things, that—

"The evidence will show, gentlemen of the jury,

that he had a catalog with him, and talked or at least, pointed out to the Pearce Brothers the style and make of the seat that was sold, or that the Steel Furniture Company would deliver to the Pearce Brothers; that they asked him why he didn't produce a sample so they could look at it.

"The evidence will show the agent said it was a little expense to carry around, but he would take them up to the Palace Theater in Detroit, where they had installed the same kind of seat that he was to sell the Pearce Brothers, which were manufactured by this company in Grand Rapids.

"The evidence will show, gentlemen of the jury, that after the Pearce Brothers went up to the Palace theater and looked over the seats, relying on the representations that were made by the agent of this company, that they came back to Wyandotte and signed up as Pearce Brothers for the number of seats alleged in this contract, at the price fixed.

"Now, gentlemen of the jury, the evidence will show that after the seats came they were put up; that they were not the seats described in the catalog that was produced by the agent, nor they were not anything like the seat that was exhibited to these men at the Palace Theater in Detroit; that the corners were such that when people came in to sit down on them they would tear their clothes; that finally they were compelled to take the seats out themselves; and the evidence will show that the defendants did take the seats out themselves. We will show you that within a reasonable time after the seats were delivered they notified them to take them away because they were not the seats ordered; that they informed the agent who sold those seats, and he kept telling them he would write to the company, as the evidence will show, for them to take care of the seats.

"Finally, gentlemen, he came over one day, and they had a talk about the seats, and he admitted, as the evidence will show, they were not seats like he had taken them to look at in Detroit. He said he had only received $9.00 for commission, and he would not bother any more to do anything about the seats.

"Now, the evidence will show that the defendants have been repeatedly notified to take their property

away, but have refused to take it away, and the seats were put together and put away; and they are now stored at the city of Wyandotte."

The attorney for plaintiff then asked the court to direct a verdict for the plaintiff. A colloquy followed, during which the contract was offered and received in evidence, and during which, referring to the statement of the attorney for defendants, the court, without being corrected, if mistaken, said:

"He conceded having received them, accepted them, and installing them."

In the course of the colloquy the attorney for defendants admitted that by the terms of the contract the purchase price of the chairs was due, and further stated:

"It seems to me under the decisions, your honor has not, until the testimony is in, and the circumstances surrounding the transaction, whether or not the seats correspond with the sample showed by the agent at the time the order was given, and before the order was actually entered into, are all matters that should be taken into consideration by your honor before you hold, as a matter of law, that there has been an estoppel.

"The question of estoppel cannot be decided until the testimony is before the court. Whether or not the seats delivered correspond to the sample from which the order was given; whether the defendants within a reasonable time notified the plaintiff to take them away, and all the facts and circumstances surrounding the whole transaction must be before the court before it can pass on the question of estoppel. The Supreme Court of this State has so decided. I have the citations here. When all the facts are before the court, it may become a question to be submitted to the jury or a question of law for the court, or a mixed question of fact and law for the court and jury.

"We admit that a contract was executed, and that seats were delivered. We deny that the seats delivered were the seats called for by the contract."

It was admitted also that the chairs were installed on Thanksgiving evening, in November, 1915. No testimony was offered or was received other than the written contract. The court directed a verdict for plaintiff, upon which judgment was entered. It is assigned as error (1) that the verdict was so directed, (2) that the court refused to receive testimony for defendants, (3) that the court decided the question of estoppel without hearing evidence.

An examination of the contract discloses that it is an order for chairs, the number to be according to a seating plan, "about 550 chairs," style No. 155. Color of wood, of metal standards, etc., are given. Setting up directions were to be sent to defendants. It contains the provisions that—

"Verbal promises or statements are not binding upon us, and this is made an express understanding of this agreement,"

—and the order was given "subject to your approval."

In considering whether a sale of personal property is completed, there is, of course, a distinction to be made between delivery of the property sold and acceptance of it by the buyer. The buyer is entitled, in cases like the one at bar, to a reasonable time to inspect the property delivered and to reject it if the seller has not delivered the goods ordered. Patent defects and variations from the agreed upon standard when goods are sold may be waived, and are waived if, after reasonable time for inspection, the goods are not rejected.

Circuit Court Rule No. 42 requires the attorney for defendant to make a full and fair statement of his case and of the facts which he expects to prove. The rule is a salutary one, upon the observance of which the trial court may, in most cases, rely. In this case, it is not claimed that by mistake or inadvertence counsel for defendants omitted to state any fact relied

upon. It appears from the evidence and from the statement of defendants' counsel, assuming that the material statements might have been proven, *first*, that the defendants ordered certain chairs to be shipped to them, described by a number. The order sent in for the approval of plaintiff contained no other specification as to style of the chairs and expressly recited that verbal promises or statements were not binding. Chairs were shipped and received. They were not the chairs described (were not style No. 155). Nevertheless, they were installed by defendants in their theater and put to use there. Some time thereafter, but at what time does not appear, the plaintiff was notified to take them away because they were not the seats ordered. Their use demonstrated that clothing was torn on them and they were *finally* removed by defendants. Testimony to this effect would tend to prove acceptance of the chairs. No reason is given, and none is apparent, for not refusing the chairs upon delivery, and, while counsel stated that within a reasonable time plaintiff was notified that they were not the seats ordered and to take them away, that is not a statement of fact, but or a conclusion. Defendants are here alleging error of law and asking for a new trial of the case, and yet the court below was not advised, nor is this court advised, that defendants can produce any testimony excusing them for installing and using these chairs, or any which will tend to prove their rejection within a reasonable time *because they were not the chairs ordered.* Under these circumstances, error is not made to appear.

The judgment should be affirmed.

BROOKE, J., concurred with OSTRANDER, C. J.

FELLOWS, J. I do not agree that the trial court correctly refused to receive any testimony and correctly

directed a verdict for the plaintiff. Defendants' counsel, as will be seen by statement of facts, stated:

"We will show you that within a reasonable time after the seats were delivered they notified them to take them away because they were not the seats ordered; that they informed the agent who sold those seats, and he kept telling them he would write to the company, as the evidence will show, for them to take care of the seats."

There was no objection made by plaintiff's counsel that the opening statement was not sufficiently definite upon the question of a reasonable time for inspection. The objection being:

"This is a written contract, and even taking the statement of counsel as true, it is no defense to this action. It cannot vary the terms of this contract. They have admitted the contract, and the amount due, and I think, accordingly, all that is left for the court to do is to direct a verdict for the amount. I don't think they can put in evidence to show those facts stated by counsel for the defendant."

The defense that the chairs shipped were not the chairs ordered did not change or vary the terms of the written contract. Had plaintiff's counsel objected to receiving any evidence because the date of the receipt of the shipment and the date of the rejection were not given, it is highly probable defendants' counsel would have supplied the dates; at least he would have had opportunity so to do. The fact that the chairs were placed does not in my judgment conclusively establish as matter of law that they were accepted. It is possible that it was necessary to place them in position in order to determine whether they were the chairs ordered, were like those defendants saw placed in position at the Palace theater.

Defendants' counsel had the right, in making his opening statement, to state his claim on the law as well as on the facts. *People* v. *Smith*, 177 Mich. 358,

and authorities there cited. In the case of *Marvin* v. *Hartz*, 130 Mich. 26, this court reversed a case brought to recover possession of land under the summary proceeding act where the complainant's counsel in his opening statement and argument referred to the proceeding as being under the forcible detainer act, and where the testimony did not justify recovery under the latter act. It was held that the plaintiff was not estopped by reason of this statement of counsel from claiming in this court that the proceedings were not under the forcible detainer act, but were under the summary proceeding act. In the instant case there is no question as to the sufficiency of the notice given under the plea of the general issue. I think the defendants were not estopped from making their proofs. When the proofs were in, the question of whether they had rejected within the reasonable time they had for inspection, might become a question of law for the court, a question of fact for the jury or a mixed question of law and fact. I think the defendants are entitled to a trial of the case in the court below and a reversal here, with costs of this court.

BIRD, MOORE, STEERE, STONE, and KUHN, JJ., concurred with FELLOWS, J.

KENDALL *v.* CHASE.

SPECIFIC PERFORMANCE—LAND CONTRACTS—CONSTRUCTION—EQUITY.

Where plaintiff conveyed 40 acres, and the grantee, in consideration of same and of services rendered, executed an agreement that plaintiff should have her support out of the same during the term of her natural life, in proceedings to enforce said contract after the grantee's death, *held*, that the contract is open to the construction placed upon it by the court below that plaintiff is entitled to her support out of the land conveyed, even though it exhaust the value of the land in so doing.

Appeal from Shiawassee; Collins, J. Submitted October 16, 1918. (Docket No. 77.) Decided December 27, 1918.

Bill by Adeline Kendall against William Chase and others for the specific performance of a land contract. From a decree for plaintiff, defendants appeal. Affirmed.

Albert L. Chandler, for plaintiff.

Austin E. Richards (*John T. McCurdy*, of counsel), for defendants.

BIRD, J. Plaintiff has resided in the township of Venice, Shiawassee county, for many years. When she was a girl she married William Kendall. He enlisted in the civil war and while in the service died, leaving plaintiff with two small children. The deceased, John Chase, lived in the same neighborhood, with three small children. His wife was living elsewhere. After plaintiff's father died Chase made an arrangement with plaintiff to keep his house and she and her children went there to live. This arrangement continued until all the children were grown and

See notes in 13 L. R. A. (N. S.) 725; 28 L. R. A. (N. S.) 607.

until John Chase died in 1916. At the time of plaintiff's employment she owned 40 acres which joined Chase's 80 acres. Soon thereafter they moved into her house. In August, 1887, for reasons which do not clearly appear of record, plaintiff and Chase went to Owosso and to the office of Jerome Turner, a well-known lawyer in that vicinity, and plaintiff made a deed of her 40 acres to Chase and as a part of the same transaction he executed the following agreement and delivered it to her:

"OWOSSO, August 18, 1887.

"In consideration of service rendered by Adeline Kendall, and land this day deeded to me, I hereby agree that said Adeline Kendall shall have her support out of the same during the term of her natural life and a home on said farm as she now does, if she chooses.

"JOHN CHASE."

After Chase died his heirs, the defendants, denied that plaintiff had the right of possession and, accordingly, served notice on her to vacate. At this time plaintiff had grown to be an old lady. She was ill, unable to work and required nursing and medical attention, so her daughter, who lived nearby, took her to her own home where she has since been nursed and cared for.

Plaintiff filed this bill praying the court to specifically enforce this contract. At the hearing counsel were very much at variance over the construction which should be given to it. Plaintiff's counsel insisted that the contract should be so construed as to give plaintiff not only the income of the 40 acres, but inasmuch as it had already been shown that the income was insufficient to support her, she was entitled to take from the *corpus* of the estate for her support. Defendants' counsel contended that a fair construction of the contract was that she should have her support out of the rents or income thereof; that a trust

was intended, the income from which was to be devoted, or so much as was necessary, to her support.

The chancellor was of the opinion that the contract imposed no personal liability upon John Chase and, therefore, his estate was not liable. He construed the contract in accordance with plaintiff's contention. He found that since the death of Chase and up to the time of trial $1,070 had been expended in the care and support of plaintiff and ordered that sum paid from the proceeds of a sale of the land which he ordered, the balance of the fund to go into the hands of the county clerk. The county clerk was charged with the duty of paying the claims already incurred and with the further duty of seeing that she was reasonably and properly cared for in the future, and if any money should be left unexpended after paying for such reasonable support and her funeral expenses, the same was to go to the heirs of John Chase. The heirs of John Chase, feeling aggrieved at this conclusion, have appealed to this court.

Both counsel make persuasive arguments in behalf of their respective contentions. It is one of those contracts which leaves the full intention of the parties in doubt. Defendants say that the fact she was to have her support for and during her natural life indicates an intention that the *corpus* of the estate should not be exhausted, because if it were, she could not have her support out of it during her life. The provision that she might have a home on said farm if she chooses also carries a like implication. Both of these provisions make for the contention of defendants that what was contemplated was the use and income and nothing more.

Plaintiff contends that a direct promise without qualification or limitation was made by Chase that plaintiff should have her support out of the same; that now she is old and ill and the rents and income

from the estate will not furnish her a reasonable support and that if compelled to rely on income alone she is not getting what Chase promised her, namely, her support out of the same. This argument is also persuasive.

At the time plaintiff conveyed the premises to Chase she did so subject to a mortgage of $300. If, however, he was indebted to her for services, as he acknowledged in the contract, in any considerable amount, she would have had little difficulty in retaining the land and paying the mortgage. This indicates that Chase paid very little value for the land, although he afterward erected a new house thereon. Whatever the reason may have been for conveying title to Chase, it is quite evident that the agreement was made to protect her from want in her old age. The agreement is open to the construction contended for by plaintiff's counsel. Had the parties intended her support to be limited to the income, it would have been easy to have so stipulated. Not having done so, we may assume that the intention was to give plaintiff her reasonable support out of the land conveyed even though it exhausted the value of the land in so doing. It having been established by the proofs that it requires something more than mere income to meet plaintiff's necessities in her present condition, we are inclined to concur in the conclusions reached by the chancellor.

The decree is affirmed, with costs to plaintiff.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

OGOOSHEVITZ *v.* WARIJAS.

1. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—TITLE—BUILDING RESTRICTIONS.
   Building restrictions upon land constitute a cloud upon the title.

2. SAME—DEFAULT—DUTY TO RETURN PAYMENT.
   Where defendants entered into a written contract with plaintiff, agreeing to sell him certain land, accepting a payment, and agreeing to furnish an abstract showing clear title, the deal to be completed within 30 days, it was defendants' duty, upon plaintiff's refusal to go on with the deal because of defects in the title, to either return the payment, as plaintiff demanded, or clear the title.

3. SAME—SPECIFIC PERFORMANCE—DEFECTS IN TITLE—WAIVER.
   Upon defendants' refusal to acquiesce in plaintiff's repudiation of the contract, and return to him the payment, he had the right to waive the defects in the title and demand performance, although the 30 days had expired, since the delay was caused by defendants' default.

Appeal from Wayne; Shepherd, J., presiding. Submitted October 23, 1918. (Docket No. 11.) Decided December 27, 1918.

Bill by Isaac Ogooshevitz against Martin Warijas and another for the specific performance of a land contract. From the decree rendered, plaintiff appeals. Reversed, and decree entered for plaintiff.

William Friedman, for plaintiff.

Felix A. Doetsch, for defendants.

BIRD, J. Defendants entered into a written contract with plaintiff agreeing to sell to him, upon land contract, certain real estate situate on the north side of Ferry avenue between Hastings and Rivard streets,

See notes in 10 L. R. A. (N. S.) 117; 38 L. R. A. (N. S.) 1195.

in the city of Detroit, for the sum of $10,000. Two hundred dollars was paid when the agreement was executed and a further payment of $2,300 was to be made when the land contract was executed. Further provisions of the agreement were:

"Possession of premises to be given only when this deal is closed on or about 30 days from date hereof. Purchaser is to receive a Burton or Union Trust Company abstract, brought down to date, showing clear title extended to date of the present time. This agreement is not assignable. Said deposit to be forfeited if purchaser fails to complete agreement on his part on or before 30 days from date hereof."

The agreement was signed on January 6, 1916. On January 18th the abstract was delivered to plaintiff. On January 25th plaintiff advised defendants, by letter, that several defects in the title were shown by the abstract, the principal and serious one being certain building restrictions to which the property was subject. Attention was called to the agreement that he was to have an abstract showing clear title and suggesting that on account of the failure of the abstract to show clear title his payment be returned. Following this, several conversations were had over the telephone by the attorneys representing the respective parties, but at the trial they were not agreed as to what was said. It is sufficient, however, to say that defendants refused to return the $200, but finally offered to return $100, keeping the balance to cover their expense and trouble. Plaintiff would not agree to this and wrote defendants, on March 17th, that having failed to return his money he assumed they elected to hold him to his contract and, therefore, he would deem himself bound by the terms thereof, and followed this with a demand that the defendants perform the agreement on their part and deliver to him a land contract, at the same time offering to pay the $2,300 in accord-

ance with the agreement. Defendants, in reply to this letter, then took the ground that plaintiff had repudiated his contract on January 25th and while they would not concede that plaintiff was entitled to the return of his money, they would, in the interest of a settlement, return $100 of it. Plaintiff being unwilling to accept this settlement, on April 27th tendered the defendants $2,500 in cash and requested a land contract in accordance with the agreement. Defendants refused to comply with the request and plaintiff filed this bill to specifically enforce the contract. The chancellor denied the relief of specific performance, but gave plaintiff a decree for $200. the amount of the initial payment.

1. It does not appear to be denied that the abstract showed that the premises were subject to certain building restrictions. It is undoubtedly true, as plaintiff urges, that building restrictions constitute a cloud upon the title. 39 Cyc. p. 1500, and cases cited.

When this situation developed it was the duty of defendants to do one of two things, either get the building restrictions released or return plaintiff's payment to him. Plaintiff suggested they return his money but defendants refused to do so and denied that he was entitled to it, thereby claiming, by implication at least, that he was still bound to perform. While matters stood in this wise and before defendants had acquiesced in plaintiff's election he advised them in writing he would waive the defects and would deem himself bound by the contract. This then placed the parties back in the position where both were bound to perform the contract. But counsel says that plaintiff repudiated the contract on January 25th and he could not thereafter insist on defendants performing it. True, he elected to have a return of his money as he had a right, as the abstract did not show a clear title, but by reason of defendants' insistence that he was

bound by his contract, he waived the defects and advised them that he would accept a conveyance subject to the defects.

It is also argued that plaintiff did not perform within 30 days and that time was of the essence of the contract and, therefore, he is not entitled to specific performance. The contract provided that he was to forfeit the payment only in the event that he failed "to complete the agreement on his part within 30 days." The plaintiff was not in default. The defendants were in default. This being true, plaintiff had a right to, and did, waive the defects, and after so doing he had a right to insist upon a performance by defendants. *Anderson* v. *Kennedy*, 51 Mich. 467; 36 Cyc. p. 746.

In view of the fact that plaintiff is willing to accept a conveyance of the premises subject to the building restrictions and subject to any other defects, we think the contract should be enforced as prayed.

The decree will be reversed and one entered in conformity with this opinion, with costs to plaintiff.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred. OSTRANDER, C. J., did not sit.

FISCHER *v.* MICHIGAN RAILWAY CO.

1. STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—AUTOMOBILES—CROSSING ACCIDENT—QUESTION FOR JURY.

   In an action against an interurban electric railway company for damage to plaintiff's automobile, caused by a collision with defendant's car, on a public highway at the entrance to a park, which was well lighted, evidence that after the engine of the automobile was stalled while making the crossing, it was there for 10 or 20 minutes before being struck, and that a friend who was assisting to extricate the machine ran down the track about 75 feet and swung his arms, but the motorman paid no attention to him, raised a question for the jury as to whether the driver of the automobile was guilty of contributory negligence in failing to make greater effort to warn the motorman.

2. SAME—NEGLIGENCE — OPERATION OF CAR — INTERURBAN CARS—RULE.

   The rule that it is the duty of a motorman on an electric car to have the car under such control as to admit of its being stopped after he became able to discover an object on the track and before a collision with such object should occur, applies to interurban railways as well as to city street cars. *Nissly* v. *Railway Co.*, 168 Mich. 676.

3. SAME—QUESTION OF LAW.

   Where the motorman testified that the speed of his car was such that it could not be stopped within the range of his vision, defendant was guilty of negligence as a matter of law.

4. HIGHWAYS AND STREETS—USE OF HIGHWAY—NEGLIGENCE.

   Persons traveling on foot and by vehicle have a right to travel upon the highway, and every part of it, and its use by one mode of travel must not be such as to endanger the safety of other modes of travel.

Error to Kent; Brown, J. Submitted October 8, 1918. (Docket No. 2.) Decided December 27, 1918.

Case by Lewis C. Fischer against the Michigan Rail-

See notes in 21 L. R. A. (N. S.) 794; 29 L. R. A. (N. S.) 929; 39 L. R. A. (N. S.) 978; 46 L. R. A. (N. S.) 702.

way Company for damages to plaintiff's automobile. Judgment for plaintiff. Defendant brings error. Affirmed.

Sanford W. Ladd and *Justin R. Whiting* (*Warren, Cady, Ladd & Hill,* of counsel), for appellant.

Barger & Hicks and *Smedley & Linsey,* for appellee.

BIRD, J. On June 29, 1917, at about ten o'clock in the evening, one of defendant's interurban cars, known as the "steamboat express," operating between Grand Rapids and the Holland boat dock, collided with plaintiff's limousine which was stalled on defendant's tracks between Jenison Park and the Olympia Pavilion at or near Holland. A jury in the Kent circuit court assessed plaintiff's damages to his automobile at the sum of $990.85. Defendant reviews the proceedings and complains of the refusal of the trial court to direct a verdict in its behalf.

1. Plaintiff's contributory negligence. One of the grounds upon which defendant based its motion was the contributory negligence of the driver. Defendant's double track system extends along the center of an east and west highway at the point where the collision occurred. Jenison Park lies at the north of the highway and the Olympia Pavilion is situate on the south. Plaintiff's automobile was in the possession of his brother, Ed. Fischer. He had as his guests in the car two ladies and one gentleman. They had visited the pavilion and were intending to cross defendant's tracks to reach the traveled part of the highway. Just as the front wheels passed over the south rail of the south track Fischer killed his engine. The engine was soon started but the rear wheels settled into the dirt and sand, which had been filled in for a cross-over, and he was unable to start it. While efforts were being made to extricate the automobile

the steamboat express came along and crashed into it. From the time the limousine became stalled until the collision occurred, variously estimated at from 10 to 20 minutes, the driver was actively engaged in trying to release it. Friends came from the pavilion and assisted him. The ordinary difficulties of releasing a 4,000 pound automobile under such circumstances were considerably increased by a heavy rainfall.

Counsel freely criticises the conduct of Fischer and the other occupants of the car, but he does not suggest what further they could have done to avert the collision except to say that Fischer could have made a better effort to flag the car. As Fischer was driving on to the south track the steamboat express from Grand Rapids passed to the west over the north track, and counsel says that he knew it would return from the dock in a few minutes and he should have made a better effort to warn the motorman. The record shows in this connection that one Moran, who was assisting Fischer in his effort to release the car, upon hearing the whistle of the approaching car, ran down the track about 75 feet and swung his arms, but the motorman paid no heed to it. The location where the collision occurred was well lighted. In front of the pavilion at the south and at the entrance to the park on the north there were many electric lights. It was a place where pedestrians and automobiles were passing frequently in the summer months. Fischer had little reason to expect that a motorman would approach a place of this character driving his car at a rate of speed which would preclude him from stopping it within a limited space if it became necessary, and evidently it was a rule of the company that cars should approach this place with caution, as it had posted warning signs along the track in that vicinity, reading: "Go slow." "Slow down." We are of the opinion that the question whether Fischer was negligent

in failing to make a greater effort to warn the motorman was under all the circumstances a question for the jury.

2. The negligence of defendant. The motorman testified in substance that on account of the storm he did not see the automobile until he was within two or three car lengths of it, or about 120 or 180 feet; that when he first saw the car he was running at the rate of 15 or 20 miles an hour, and that running at that rate of speed it would require 400 feet in which to stop.

Based upon this testimony, the trial court instructed the jury that defendant was guilty of negligence as a matter of law because, under the motorman's own concessions, the speed of his car was such that it could not be stopped within the limit of his vision. This conclusion was rested on the cases of *Ablard* v. *Railway*, 139 Mich. 248, and *Hibbler* v. *Railway*, 172 Mich. 368.

It was said in the *Ablard Case* that:

"It was the duty of the motorneer to have the car under such control as to admit of its being stopped after he became able to discover objects on the track and before a collision with such object should occur."

In the *Hibbler Case* this rule was quoted, approved and applied to the facts of that case. Counsel recognizes the rule in these cases but seeks to distinguish them from the present one on the ground that these cases arose in a city street where traffic is more or less dense and congested, and he argues that conditions are different with interurban railways and therefore the rule should not apply to them. There is some force in this distinction, but the difficulty of giving it effect lies in the fact that this court has already applied this rule to interurban railways. *Nissly* v. *Railway Co.*, 168 Mich. 676.

In the case cited a recovery was sought for the

killing of a colt which ran onto the track in front of the car. Excessive speed was charged as negligence. It was there said:

"This motorman was not bound to anticipate that plaintiff's horse would be at large or concealed behind a tree, and therefore owed no duty to reduce his speed of what would otherwise be reasonable. It is undeniable, however, that if his rate of speed was unreasonably great, it would be negligent, and we are of the opinion that if the motorman was running his car so fast that he could not have stopped it within the distance that this colt could have been seen upon a straight track, the jury might have been justified in finding this speed unreasonable. * * *

"This motorman was not bound to anticipate that a colt would be at large and come suddenly upon the track so near that the car could not be stopped in time to avert an accident, and, if his speed was not such as to have precluded the stopping of the car within the distance that such an object could have been seen upon the track that night, there was no negligence. This was, however, a question for the jury." Citing the case of *Gilmore* v. *Railway Co.*, 153 Pa. 31 (25 Atl. 651, 34 Am. St. Rep. 682), and 2 Nellis on Street Railways (2d Ed.), § 515.

We must conclude, therefore, that this rule applies to the operation of interurban cars as well as to city street cars. The testimony of the motorman concedes that he violated this rule, therefore the action of the court in charging the jury that defendant was guilty of negligence as a matter of law must be sustained. Had any question of fact been involved, as in the *Nissly Case*, which was necessary to be determined before the rule could be applied, the question would have been one for the jury. When, however, the motorman comes into court and admits that he did an act which this court has said is a negligent act, there is no occasion to submit the question to a jury.

Counsel observes that this rule is a harsh one to apply to interurban traffic in view of the public de-

mand for rapid transit. The fact must not be overlooked that we are dealing with an interurban railway located in the public highway and not one on a private right of way. Persons traveling on foot and by vehicle have a right to travel upon the highway and every part of it, and its use by one mode of travel must not be such as to endanger the safety of other modes of travel. As long as interurban companies are content to locate their lines upon public highways, they must yield to reasonable regulations for the protection of others who have a right to use them.

The judgment must be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ADAMS v. W. E. WOOD CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ADDITIONAL COMPENSATION—CERTIORARI—QUESTIONS OPEN TO REVIEW.
   On certiorari to review an award of additional compensation to an injured employee by the industrial accident board, where defendant appeared before the board, introduced proofs, argued the case upon the merits, and offered no objection to the practice, its claim in this court that the board was without authority to reopen the case and award additional compensation is without merit.

2. SAME—SETTLEMENT—APPROVAL BY INDUSTRIAL ACCIDENT BOARD.
   A settlement receipt obtained by defendant, but not filed and approved by the board, as required by the statute, is not conclusive upon it.

3. SAME—COMPENSATION—QUESTION FOR BOARD.
   In the event that an employer and an injured employee

See notes in L. R. A. 1916A, 23; L. R. A. 1917D, 80.

cannot agree as to the length of time the latter is entitled to compensation, it is a proper question for the board to determine.

4. SAME—EVIDENCE—FINDING BY BOARD—CONCLUSIVENESS.

Evidence that while plaintiff, who had suffered a broken arm in defendant's employ, was on a street car on his way to see defendant about resuming his occupation as a watchman, at the doctor's suggestion that if he was careful he might return to work, although he was still under the doctor's care and his arm in a sling, suffered a second fracture of the same arm, *held*, sufficient to support the finding of the board that plaintiff had not recovered from the former injury, that the former injury contributed to the later one, and that he was entitled to additional compensation during the time of his disability.

Certiorari to Industrial Accident Board. Submitted October 9, 1918. (Docket No. 24.) Decided December 27, 1918.

Merve Adams presented his claim for compensation against the W. E. Wood Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the Zurich General Accident & Liability Insurance Company, Limited, insurer, bring certiorari. Affirmed.

Kerr & Lacey, for appellants.

Campbell, Dewey & Stanton, for appellee.

BIRD, J. This is a review, by defendants, of an order of the industrial accident board awarding to plaintiff additional compensation for injuries which he received while in the employ of the defendant, W. E. Wood Company.

Plaintiff is a brick mason by trade and is about 37 years of age. He resides and works in the city of Detroit. On March 7, 1917, at the intersection of Farmer street and Lafayette boulevard he slipped and

fell, dislocating his left shoulder. His injury resulted in a partial paralysis of his left hand or fingers. This incapacitated him from following his trade for the time being, so he sought and obtained a position with defendant, W. E. Wood Company, as watchman. He commenced this employment on April 9, 1917. On April 23d, while at his regular work, he had occasion to close a gate or door which hung on rollers. In doing so, it jumped the track and fell on him, breaking his left arm six or seven inches above the elbow and otherwise injuring him. He demanded compensation from his employer and an agreement was reached whereby he was to receive $10 per week. This agreement was filed with and approved by the industrial accident board. Weekly payments were made under this agreement up to July 17th, at which time the attending physician indicated to plaintiff that he was in a condition to resume his work of night watchman. Acting on this suggestion he boarded a street car and went to defendant's plant to make arrangements to take up his work again. In passing out of the car door he was shoved or crowded by fellow passengers against the door casing and suffered another fracture to his left arm. Whether the arm was refractured at the point of the old break or further down near the elbow is in dispute. Plaintiff, being unable to resume his work, requested further compensation from his employer, but this was refused on the ground that he had signed a settlement receipt when the last payment was made to him in July. On October 31st he filed this application with the board, praying that his case be reopened and additional compensation allowed. At the hearing the facts were placed before the board and a finding was made, in substance, as follows:

"(a) That at the time of signing said settlement receipt said applicant had not recovered from the in-

jury sustained on April 23d while employed by respondent.

"(*b*) That he had not actually resumed his employment.

"(*c*) That his injuries of April 23d were aggravated by another injury which he received on the street car July 17th while on his way to defendant's plant to resume his employment, and that this occurrence increased the period of applicant's disability which he received on April 23, 1917.

"(*d*) That the injury which he received on April 23d was the proximate cause of the street car injury.

"(*e*) That the board has serious doubts whether applicant was able to resume his work on July 17th or on September 15th."

Upon these findings an award was made granting plaintiff compensation at the rate of $10 per week from the time the payments were stopped on July 17th up to and including September 15, 1917, amounting to $86.66, which sum was ordered to be paid presently. It was further ordered:

"That if it should develop that applicant is not able to resume or continue in the employment in which he was engaged at the time of the accident, April 23, 1917, because of physical disability chargeable to said accident, said applicant is to be paid compensation from and after September 15, 1917, according to the terms of the agreement approved by the board May 25, 1917."

Defendants have assigned error on this order, as follows:

"1. The industrial accident board did not have authority or jurisdiction to enter an order directing respondents and petitioners to pay further compensation to applicant.

"2. There is no testimony upon which the award of the industrial accident board can be based.

"3. The industrial accident board erred in holding that injuries received by applicant as a result of accident of April 23, 1917, while in the employ of said

respondents were aggravated by street car accident of July 17, 1917.

"4. The industrial accident board erred in holding that injuries received by applicant while in the employ of the respondents on April 23, 1917, was the proximate cause of the street car accident of July 17, 1917.

"5. The industrial accident board erred in concluding 'and the board also very much doubts that applicant was on July 17, 1917, or on September 15, 1917, or is now in such condition as to be able to resume his occupation as a watchman.'

"6. The industrial accident board erred in ordering respondents to pay compensation to said applicant from July 17, 1917, up to and including September 15, 1917."

1. Counsel argue that the board had no right to consider the merits of plaintiff's claim in response to an application to reopen his case. The board returns that it is its customary practice to consider the merits upon an application to reopen a case, that it was followed in this case and defendant's counsel took part in the proceedings, introduced proofs, argued the case upon the merits and offered no objection to the practice. It does not appear that counsel have petitioned the board to reopen the case to admit further proofs, neither does it appear that they have any further material proofs to submit. Under these circumstances we think the claim is without merit.

2. It is said there is no testimony upon which the award of the industrial accident board can be based. Under this head it will be proper to consider the other questions raised. When the employer and employee agree upon compensation and file their written agreement with the industrial accident board and it is approved, jurisdiction of the parties is thereby conferred upon the board to act in the premises. The method by which the settlement receipt was obtained is questioned by plaintiff, and also by the board. We see

no occasion to discuss this question further than to say that inasmuch as the settlement receipt was not filed and approved, the board would be in no wise concluded by it.

It appears to be conceded that plaintiff was injured and entitled to compensation. The disagreement arises over the length of time he was entitled to it. In the event the parties could not agree as to this it was a proper question for the board to determine. This the board did do but counsel argue that its finding is not supported by the testimony.

It appears without question that plaintiff was severely injured on April 23d and that on July 17th he was still under the doctor's care and his left arm was in a sling, and that he was unable to make any use of it. The doctor advised him, at about this date, that he thought he could resume his work of watchman if he were careful. The doctor does not say he had fully recovered. Acting on the doctor's suggestion, plaintiff started for his place of employment but was injured before reaching there. He submitted this third injury to Dr. Hall, defendant's physician, and he remarked "that it was as bad as ever," and continued to treat him for several weeks thereafter. Dr. O'Donell, who treated him for the injury of March 7th, testified that the numbness of the fingers was probably due to an injury to the nerves when the shoulder was dislocated; that at the end of five or six weeks of treatment the injury was progressing nicely with good prospects for complete recovery. He also testified he had examined him within two or three days of the hearing and his arm at that time had lost 100% of its usefulness and, in his judgment, would never be any better. Measuring plaintiff's condition as described by Dr. O'Donell before his employment with defendant, with his condition as described on July 17th, we think it is open to a reasonable infer-

ence that plaintiff had not recovered on July 17th from his injuries of April 23d. Neither do we think the inference of the board that the injury of April 23d contributed to the injury of July 17th and was aggravated by it is unsupported by the evidence.

Just to what extent plaintiff's present condition is due to the original injury is somewhat difficult to determine. It may be inferred from Dr. O'Donell's testimony that the effect of the injuries of March 7th would have disappeared had it not been for the injury of April 23d. This, however, was a question of fact and we must assume that due consideration was given to it by the board.

The order of the industrial accident board is affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ENGEL v. TATE.

APPEAL AND ERROR—EXCEPTIONS TO FINDINGS—REVIEW.

Where the cause was tried in the court below without a jury, and no exceptions were filed: to the findings of fact, that there was no evidence to sustain such findings, that they are opposed to the weight of evidence, that the facts found do not support the conclusions of law or the judgment that was entered, and no points of law were presented as upon requests to charge, an affirmance of the judgment in this court is required. Circuit Court Rule No. 45; 3 Comp. Laws 1915, §§ 12586, 12587.

Error to Kent; Brown, J. Submitted January 10, 1917. (Docket No. 74.) Decided December 27, 1918.

Assumpsit in justice's court by Anna W. Engel against Walter F. Tate for breach of a land contract. There was judgment for defendant, and plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Smedley & Linsey, for appellant.

E. A. Maher, for appellee.

BIRD, J. The parties to this litigation entered into the following contract on the 26th day of July, 1915:

"GRAND RAPIDS, MICH., 7/26/1915.

"This agreement made by and between Walter F. Tate, of the first part, and Mrs. A. W. Engel, of the second part, witnesseth:

"That the party of the first part agrees to sell and convey to party of the second part, all that piece or parcel of land, to wit, Lot number eleven (11), Block sixteen (16), Ellsworth Addition to city of Grand Rapids, with good title, and second party agrees to pay to first party the sum of fifteen hundred ($1,500) dollars for same, as follows: Fifty ($50) dollars on signing of this agreement, and fourteen hundred fifty ($1,450) dollars on the delivery of good and sufficient deed.

(Signed) "WALTER F. TATE,
"MRS. A. W. ENGEL."

Following the making of the contract plaintiff made payment of the $50 which the agreement called for and her counsel examined the abstract. No defects of a serious nature being found, plaintiff advised defendant she was satisfied with the title and ready to close the deal, when the tenant, Mrs. Sayfee, who was in possession of the premises, should vacate the same. Plaintiff claims that defendant agreed to meet her at her husband's office on August 10th and close the deal.

Instead of doing so he sold the premises on that day to Garley & Mydeen for a consideration of $1,625. Later she purchased the premises from them, paying $1,725 therefor, after which she brought this suit to recover the damages which she had suffered by reason of defendant's failure to convey the premises to her as agreed. The case was tried by the trial court without the aid of a jury and a verdict was rendered for plaintiff for the sum of $275, this being made up of the $50 which the plaintiff paid upon the execution of the contract, and $225 damages. Defendant argues two questions:

(1) That plaintiff breached the contract.
(2) That there was no evidence produced tending to prove plaintiff's legal measure of damages.

1. The principal issue of fact in the trial court was as to which party breached the contract. Defendant's representative, Mr. Adams, claims that he had the deed ready for delivery on August 4th, and that he called plaintiff's husband and so advised him; that plaintiff's husband replied that they would pay no more money until the tenant, Mrs. Sayfee, vacated the premises, or until they could have possession. Defendant construed this to be a refusal to go on with the deal in accordance with the agreement and, therefore, felt at liberty to sell the premises to another, which he did within a few days thereafter.

Plaintiff insists that defendant agreed to give them possession of the premises when the deal was closed, and that while waiting for the tenant to vacate defendant sold the premises to other parties. The trial court found with the plaintiff on this issue. After a review of the testimony we are impressed with plaintiff's claim that defendant agreed to give possession of the premises when the deal was closed. The testimony shows that the tenant was notified to vacate and that she was making her plans to remove from

the premises on or about August 10th. It is conceded that Mrs. Sayfee was still in possession of the premises when Mr. Adams announced to plaintiff on August 4th that he was ready to close the deal. Taking the view that defendant was obligated to deliver possession when the deal was closed it follows that the plaintiff was not in default in refusing to close the deal before the tenant vacated or was removed.

2. Counsel are agreed that plaintiff's measure of damages is the difference between the price agreed to be paid and the fair market value at the time of the breach, but defendant argues that plaintiff made no proof of their market value and, therefore, the court's finding that the value of the premises was $1,725 is unsupported. The testimony discloses that the premises were sold by defendant to Garley & Mydeen for $1,625, and by them to plaintiff for $1,725. Proof of what property sold for is some evidence of its value. *Smith* v. *Mitchell,* 12 Mich. 180; *Harmon* v. *Walker,* 131 Mich. 540; *Barbrick* v. *White Sewing Machine Co.,* 180 Mich. 535; *Hutchinson* v. *Poyer,* 78 Mich. 337; *Davis* v. *Zimmerman,* 40 Mich. 24; *Dyer* v. *Rosenthal,* 45 Mich. 588.

While this proof of value is not as satisfactory as it might have been, it furnished some support for the court's finding. Upon the whole case we think the finding should not be disturbed. The judgment will be affirmed, with costs to plaintiff.

OSTRANDER, C. J. In this cause the court made a finding of facts, and no exception thereto is put upon the ground that there was no evidence to sustain them. No exception raises the point that any conclusion of fact is opposed to the weight of evidence. Nor is any exception rested upon the ground that the facts found do not support the conclusions of law or the judgment which was entered. No points of law were presented

as upon requests to charge. See, Circuit Court Rule No. 45; Judicature Act, chap. 18, §§ 14, 15 (3 Comp. Laws 1915, §§ 12586, 12587).

The assignments of error follow the exceptions. Under the circumstances, an affirmance of the judgment is required.

MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with OSTRANDER, C. J.

PEOPLE v. LINTZ.

1. CRIMINAL LAW—RECEIVING STOLEN AUTOMOBILE—ELEMENTS OF OFFENSE—INTENT—QUESTION FOR JURY.

In a prosecution for having purchased and concealed a stolen automobile in violation of section 15301, 3 Comp. Laws 1915, guilty knowledge is an essential element of the offense, and, when denied, is a question of fact for the jury.

2. SAME—INTENT—TRIAL—INSTRUCTIONS.

Where the evidence showed that the car was purchased by defendant's employee from two boys, but defendant denied knowledge that it was stolen, an instruction by the court to the jury that if defendant "knew that this car was purchased of two boys that that circumstance itself was sufficient to charge him with knowledge that it was a stolen car," standing alone was erroneous.

3. SAME—TRIAL—INSTRUCTIONS—CURING ERROR.

But where such instruction was immediately modified by the statement "that is, the fact that two boys brought that car there for sale was sufficient to put him upon inquiry," when taken in connection with instruction previously given that "the prosecution must show * * * beyond all reasonable doubt that he knew at the time

See note in 22 L. R. A. (N. S.) 833.

he purchased said automobile * * * that said automobile had been stolen," etc., *held*, that the jury were not misled.

4. SAME—EVIDENCE—DISCRETION OF COURT.

While the court might properly have permitted defendant to answer the questions as to what kind of schooling or education he had, whether he had ever had any training in bookkeeping, there was no error in rejecting the answers, such questions being within the discretion of the court.

Error to Genesee; Brennan, J. Submitted October 17, 1918. (Docket No. 119.) Decided December 27, 1918.

C. H. Lintz was convicted of having purchased and concealed a stolen automobile, and sentenced to imprisonment for not less than one year or more than five years in the State reformatory at Ionia. Affirmed.

Charles S. Abbott, George W. Cook, and *Marshall Frisbie,* for appellant.

Roy E. Brownell, Prosecuting Attorney, and *H. B. Freeman,* Assistant Prosecuting Attorney, for the people.

BIRD, J. Defendant was convicted in the Genesee circuit court of having purchased and concealed a stolen automobile in violation of the following statute:

"Every person who shall buy, receive or aid in the concealment of any stolen money, goods or property, knowing the same to have been stolen, if the property purchased, received or concealed exceed the value of twenty-five dollars, shall be punished by imprisonment," * * * 3 Comp. Laws, § 15301.

Defendant operated a garage and sales agency in the city of Flint. At about three o'clock in the morning of October 30, 1917, two boys 18 years of age

drove into defendant's garage a Hudson touring car which they had stolen the evening before on the streets of Detroit. When defendant came to the garage in the morning his attention was called to the car and he was advised by his brother, who was in his employ, that the car was for sale. As he was on the point of leaving for Detroit he instructed his brother "if he could buy the car and buy it right, to do so." Later in the day the car was purchased by one of his employees for $200. It was taken at once to the repair shop where the tires were taken off and others substituted therefor; the top was replaced by a closed top and the serial and chassis numbers were mutilated. Defendant admitted that he purchased the car but denied that he had any knowledge that it was a stolen car. Whether he had such knowledge was the seriously contested point in the case. The jury found the defendant guilty as charged and the proceedings are now before us for review on writ of error.

1. Error is assigned on the following instruction:

"Now, it is undisputed that the car was taken to the C. H. Lintz garage on the morning of the 29th day of October, 1917, by these two boys—or the morning of the 30th, I should say. Now, if Mr. Lintz—I charge you if Mr. Lintz knew that this car was purchased of two boys that that circumstance itself was sufficient to charge him with knowledge that it was a stolen car—that is, the fact that two boys brought that car there for sale was sufficient to put him on inquiry, if he had such knowledge, and this you must find beyond a reasonable doubt from the evidence in this case."

Counsel argue that to so instruct the jury was error; that guilty knowledge was a question of fact for the jury and that when the court instructed them that this circumstance was sufficient to charge defendant with guilty knowledge, he invaded the province of the jury.

Guilty knowledge under this statute is an essential element, and, when denied, is a question of fact. We, therefore, agree with counsel that it was error to instruct the jury that "this circumstance itself was sufficient to charge him with knowledge that it was a stolen car." The weight to be given to this circumstance was for the jury and it was for them to say whether the circumstance, considered in connection with other testimony, was sufficient to charge defendant with knowledge that the car was a stolen one. *People* v. *Levison*, 16 Cal. 98 (76 Am. Dec. 505); 34 Cyc. p. 530, and notes. We do not understand that the prosecutor contends otherwise. His contention is that when this part of the charge is read in connection with other portions of the charge, and particularly the portion immediately following, the erroneous instruction is so modified that the error disappears. The trial court, evidently feeling that he had gone beyond the safety zone, immediately, and in the same connection, said: "that is, the fact that two boys brought that car there for sale was sufficient to put him upon inquiry." This instruction was proper. Roscoe's Criminal Evidence (5th Am. Ed.) p. 876. This was a fact which the jury had a right to consider in determining whether defendant had guilty knowledge. This instruction is unlike those given in the cases cited by counsel. In those cases the instruction went farther and advised the jury as to the sufficiency of certain proofs and the necessary inferences to be drawn therefrom. Being of the opinion that the latter instruction was a proper one the question gets around to this: Did the jury understand that the latter instruction was a substitute for the first, and were they misled by it?

Previous to giving the instructions in question the trial court had instructed the jury very fully with reference to the rights of the defendant and the duty of the people. He had theretofore said to them that:

"It is not enough to show that Lintz purchased the automobile, or that he received and had said automobile in his possession, or that he received and had and aided in the concealment of said automobile. These standing alone do not constitute the criminal offense charged. But the prosecution must show by competent evidence beyond all reasonable doubt, that he (Lintz) knew at the time he purchased said automobile, or received said automobile, or aided in its concealment, that said automobile had been theretofore stolen, and unless the prosecution so shows beyond all reasonable doubt that Lintz knew said automobile had been stolen you must find a verdict of 'not guilty.' * * *

"I charge you that Mr. C. H. Lintz cannot be held criminally responsible for the criminal acts of his employees unless he participated therein or had knowledge thereof. If Mr. C. H. Lintz authorized one of his employees to purchase an automobile and furnished the money for such purpose, and such automobile proved to have been a stolen car, if Mr. C. H. Lintz did not know that such car was a stolen car then he would not be liable criminally. * * *

"I charge you that in this case that even if you become satisfied by the evidence that the serial numbers on the stolen car in question in this case were changed, and also find that they were even changed by the respondent or at his direction, your verdict, under the law, would still have to be that of not guilty, unless you also were able to find from the evidence, that this car in question was a stolen car and that the defendant knew that it was a stolen car."

From these instructions we think the jury must have understood what defendant's rights were and what they must find before they could convict him, and, therefore, must have been in a position not only to see but to understand the force of the correction which the court made of the erroneous instruction. We, therefore, conclude that the jury were not misled by it.

2. Complaint is made because defendant was not permitted to answer the following questions:

"Q. Mr. Lintz, what kind of schooling or education did you have? Have you ever had any training in bookkeeping?"

Counsel say that one's schooling and educational training is frequently a big aid in shielding one against the tricks and artifices of designing crooks and criminals. After defendant had been before the jury as a witness and been subjected to a long examination by both counsel, these questions do not appear to have been very important. When opposing counsel have finished with an important witness the jury usually have some well-defined idea of his mental attainments. We think no error would have been committed either in admitting or rejecting the answers. They belong to a class of inquiries which are ordinarily within the discretion of the trial court.

Another error is assigned on the charge and is argued, but we think it will be unnecessary to consider it inasmuch as the prosecutor has called attention to an omission in defendant's quotation of it.

Finding no prejudicial error in the record the judgment of conviction must be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WUDLICK v. CHICAGO & NORTHWESTERN RAILWAY CO.

1. MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE—DIRECTED VERDICT.

In an action against a railroad company for personal injuries received by plaintiff, one of its section hands, while attempting to pass under a steam shovel being operated by another company, evidence that plaintiff was going after some tools where they had been left the night before by order of his foreman, that he was not directed to reach the tools the way he took, and that there were other ways he could have taken and reached them in safety, *held*, sufficient to support a directed verdict for defendant, there being no evidence of negligence on its part.

2. SAME—WORKMEN'S COMPENSATION ACT — FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE—DEFENSES.

Although defendant had not elected to come under the workmen's compensation law, plaintiff cannot recover under either the Federal or State law unless some negligence on the part of defendant is shown.

Error to Gogebic; Cooper, J. Submitted October 24, 1918. (Docket No. 46.) Decided December 27, 1918.

Case by Vinco Wudlick against the Chicago & Northwestern Railway Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

James A. O'Neill, for appellant.

Frank A. Bell, for appellee.

The plaintiff in this case, a man 51 years of age, had been employed by the defendant railway company as a section hand for nine months prior to the time he received the injury which constitutes the basis

of this action. Prior to his employment by the defendant he had worked for about two years in the woods. He was injured on the 11th day of October, 1916, under the following circumstances: The defendant railway carried ore from the premises of the Newport Mining Company. To facilitate such operation the Newport Mining Company maintained and operated at its stock pile a large 60-ton Bucyrus steam shovel with which it loaded the ore upon cars furnished by the defendant railway company. The stock pile ground was between 600 and 700 feet long, running north and south, and from 100 to 150 feet wide, east and west. The steam shovel was operated along the easterly edge of the stock pile from south to north upon temporary tracks which, as it advanced north, would be brought from the rear and attached in front. The loading track upon which the cars of the defendant company stood while being loaded by the steam shovel was placed from 15 to 18 feet east of the line upon which the shovel operated northerly. After the steam shovel had operated through the stock pile to its northerly extremity it would be returned to the southerly end of the stock pile and again repeat the operation. This change in the location of the steam shovel would necessitate the shifting to the west of the temporary loading track used by the defendant railway company to place its cars during the process of loading. On the day preceding the accident to the plaintiff, he, with some 15 or 20 other section hands, had been engaged in the operation of moving the temporary loading track to the west so that the steam shovel, which was in position to continue the loading process, might reach defendant's cars. Plaintiff and his fellow workers had worked an hour overtime on the night of the 10th of October in order to complete the shifting of the track but had not been able to quite finish the job. Plaintiff said:

"We was pretty near through, but we had some blocking to be done under the ties."

At 7 o'clock on the night of the 10th the workmen were instructed to leave their tools where they were and go home. The next morning, October 11th, plaintiff and the other members of the gang met according to custom at the car house and were there instructed by the foreman to go to the Bonnie mine where they had left their tools overnight and to proceed from there to the Pabst mine where there was a job for them to do. The distance between the car house where this order was given and the point at the Bonnie mine where they had left their tools was nearly a mile, and there were several routes between the two points which the men might take. Plaintiff and three of his companions chose a certain route which caused them to approach the stock pile from the west. This brought the steam shovel between them and the loading track some 15 or 18 feet east of the line upon which the steam shovel stood. The exact time at which the accident occurred is not clear, but it was apparently some time between 7:15 and 8 o'clock in the morning. In the meantime the defendant railway company had placed empty cars upon the loading track east of the steam shovel and when the four men, including the plaintiff, approached the steam shovel from the south and west, it was in operation loading the cars to the east. Plaintiff described the accident as follows:

"When I got in sight of the steam shovel with Povlak ahead, Mike second and I coming third, I saw this Charley Povlak and Mike Wesilich going through and I seen the dipper way up and I thought I was going to be safe and I started through myself. Mike Wesilich and Povlak passed through in front of the shovel. They went through all right then after I seen Charley Povlak and Mike Wesilich went through, I thought I was going to be safe and I started through. Just as I got through, the dipper came down and squeezed

me and I heard the craneman holler. That is all I could hear. I fell down and I heard the craneman holler. When I first came in sight of the steam shovel that morning, I seen the engineer or whatever you call him. He was inside the shovel where he belonged. He was sitting down to his place where he belonged. I seen those two fellows go through and I started to go through myself. I don't know just exactly which way he was looking. I thought to myself that he was looking down, but I didn't watch him very much; I wanted to get by. The dipper was up in the air at that time.

"*Q.* Was it moving when you saw it first?

"*A.* No.

"*Q.* And when was the first time that you knew that they were using the shovel, that it was moving?

"*A.* I never seen the shovel in motion but the time that I got at the shovel, and after I was injured I didn't know anything. It was daylight at that time.

* * *

"I went through in front of the steam shovel to get my tools because I seen Charley Povlak and Mike Wesilich go through and I had to go because they went through. I go through there just because I had to go 1,000 feet either way around until I would reach my tools; 1,000 feet either way, north or south or whatever it is."

The operator of the steam shovel was sworn by the plaintiff and examined under the statute. He described the shovel as being a structure from 30 to 35 feet long with a frame 5 feet 7 inches wide and a boom extending in front 35 or 40 feet to which was attached a bucket carrying two and one-half cubic yards. He testified that when in operation the bucket would make four round trips from the stock pile to the cars in one minute; that in operation the engine made a noise which could be heard from 100 to 1,000 feet away; that it was his duty in the operation of the shovel to keep his eyes upon movements of the crane and bucket and that from his position upon the shovel and by reason of the intervening portions of the struc-

ture it was difficult for him to see any one attempting to pass in front of the shovel; that in any event he did not see either plaintiff or his companions attempting to pass in front.

In commencing this action plaintiff joined the Newport Mining Company and the operator of the steam shovel as parties defendant. At the conclusion of the testimony, on motion of his own counsel, he was permitted to enter a nonsuit in favor of the mining company and the shovel operator. A motion was then made on behalf of the defendant railway company for the direction of a verdict upon various grounds and a verdict was so directed by the learned trial judge upon the ground that plaintiff's testimony, given its most favorable construction, failed to show any actionable negligence upon the part of the defendant. In reviewing the case in this court plaintiff claims:

"1. That the question of the defendant's negligence in sending plaintiff into a dangerous place without warning him of the danger, and in failing to furnish him a reasonably safe place for the performance of the work required of him, was for the jury.

"2. That, the defendant not having elected to come under the workmen's compensation act, the defenses of the plaintiff's contributory negligence or assumption of risk, were not open to it."

BROOKE, J. (*after stating the facts*). Plaintiff himself testified:

"We left our tools between the shovel and the railroad cars 35 feet away from the shovel to the north."

Frank Malko, one of the three men who accompanied him at the time he was hurt, testified:

"We left our tools at the place we was working, about 300 feet or maybe more from the steam shovel."

Plaintiff as well as other witnesses sworn in his behalf testified that there were other ways in which they could reach the point where their tools lay in

perfect safety. Whether the tools were lying at a point 35 feet from the shovel or 300 feet therefrom would seem to be unimportant as in either event they were in a safe place. It cannot be claimed on behalf of plaintiff that he was ordered to reach his tools along the way he took nor can it be said that any custom existed which made it necessary or proper for him to follow that extremely hazardous course. He was accustomed to working in the immediate vicinity of steam shovels and must be held to have had knowledge of the danger attendant upon his act. This is not asserted as bearing upon plaintiff's assumption of the risk of injury from his act, but in its relation to the question of defendant's negligence. It is clear that plaintiff cannot recover against defendant either under the Federal or State law unless some negligence on the part of the defendant is shown. *Lydman* v. *DeHass*, 185 Mich. 139, and *Miller* v. *Railroad Co.*, 185 Mich. 432.

We have no hesitation in holding that the verdict in this case was properly directed.

BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred. OSTRANDER, C. J., did not sit.

RATHBONE v. DETROIT UNITED RAILWAY.

1. TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.
   Where a requested instruction was fully covered in the charge as given, there was no error in its refusal.
2. RAILROADS—CROSSING—WARNING.
   In operating a heavy motorcar at a rate of 50 or 60 miles per hour, there would rest upon the company the common-law duty to give notice of its approach to a crossing.
3. TRIAL—NEGLIGENCE—INSTRUCTIONS.
   An instruction dealing with the negligence of two defendants, where the court had previously instructed that one defendant was guilty as a matter of law, and leaving the question of the negligence of the other defendant to the jury, *held*, not misleading.
4. DAMAGES—EXCESSIVE VERDICT—EXPECTANCY.
   Where, at the time of the trial, eight years after his injury, plaintiff was 84 years of age, and still had an expectancy of more than three years, considering the pain and suffering he has endured, and his loss of earnings of $900 per year, it cannot be said that a verdict for $11,000 was excessive.

Error to Wayne; Codd, J. Submitted October 8, 1918. (Docket No. 14.) Decided December 27, 1918.

Case by William Rathbone against the Detroit United Railway and another for personal injuries. Judgment for plaintiff. Defendant railway brings error. Affirmed.

Corliss, Leete & Moody (*William G. Fitzpatrick*, of counsel), for appellant.

James H. Pound, for appellee.

BROOKE, J. This case was once before in this court and is reported in 187 Mich., at page 586, where a sufficient statement of the facts will be found. A second trial has again resulted in a verdict in favor of the plaintiff, this time in the sum of $11,000 and

See notes in 15 L. R. A. 426; L. R. A. 1915F, 30.

against both defendants. It is again reviewed in this court under assignments of error grouped by counsel for appellant as follows:

a. Refusal to charge as requested.
b. The charge as given.
c. Overruling defendant's motion for a new trial.

Error is assigned upon the failure of the court to give defendant's fourth and fifth requests to charge as follows:

"If the jury believes that the road roller did not start to come upon or towards the track until such time as the car was within the distance from the crossing in which it was possible to stop, then defendant would not be shown to be negligent on the ground of having failed to control his car and avoid the collision. * * *

"If his track was clear and there was nothing in the situation, position or movement of the road roller to suggest danger to the motorman until such time as he got so close to the crossing as to render it physically impossible to stop before reaching it, the speed of his car considered, then the motorman would not be held negligent in failing to stop his car in time to avoid the collision; neither would the speed of his car, if lawful and proper, before the obstruction or danger became apparent, be rendered negligent and improper by reason of the fact that he could not stop the car in the distance intervening."

The court charged the jury at great length in part as follows:

"It is their duty, gentlemen of the jury, to operate their cars, to have their servants operate those cars with due consideration of all of the circumstances surrounding that operation. If they exercised their functions in the same way that pertains to railroad companies generally, furnish its road and run it in the customary manner, which is found to be safe and prudent, they did all that is incumbent upon them and performed that degree of care required to be exercised toward or received by passengers upon steam railroads, they did all that is required.

"Now, gentlemen of the jury, there is a little variance in the testimony as to the speed of the car at the time of the collision. That is, the speed at which it was operated. The business of the country demands of railroads, rapid transit of persons and property, and it cannot be said that the speed which has been testified to in this case is of itself as a matter of law, a negligent speed when running through the country outside of villages or cities or other thickly settled communities. It is, however, your duty to take into consideration all of the circumstances surrounding the operation of the car at the time in question. It is for you to say as a matter of fact, whether or not the speed of the car was such a speed as a careful and prudent person would have used under all of the circumstances surrounding the case. You have heard the testimony, and considerable testimony has been brought to your attention in that respect, as to the condition of the track, regarding highways and crossings and all other matters, the foliage upon either side of the track. All of these matters. It is for you to say from that testimony, taking that testimony and the evidence which you believe to be controlling and the circumstances at the time in question, as to whether or not the speed of the car was such a speed as a careful and prudent person would have used, under the circumstances in question. If you find that it is such a speed as would be used by a careful and prudent person in the operation of a car at that time and place, then that act cannot be an act of negligence on the part of the servant of the defendant company, and the defendant company is absolved from all liability resulting therefrom. A person in the operation of a highly speeding object in going through woods and over public highways must exercise the care that such conditions require, and the question for you to find out is, Did the servant of the defendant company do that? If he did, he discharged his duty, and if he did not and if by reason of his failure to discharge his duty or to act in this respect as a prudent and careful person would do, under all of the circumstances, the plaintiff is entitled at the hands of the defendant, to recover for his full damages, if damage resulted to him by reason of this fact. Now, gentlemen of the

jury, the defendant carrier is not an insurer of the safety of its passengers, and it can only be held liable for injuries caused by its negligence, and under the evidence in this case, the question of the defendant carrier's liability is to be determined by the rules which govern the operation of steam railways in the open country rather than by rules governing the operation of cars in the streets and highways of cities, villages or thickly populated communities. No presumption of negligence arises because of the happening of the accident and plaintiff's injury and the burden of proof rests upon the plaintiff to show that the defendant railway company was negligent. The railway company had the right to operate its cars at a high rate of speed and the rate of speed alone is not in and of itself negligence. Interurban cars are not limited in the rate of speed that they may run across highways, provided proper care is taken in approaching the same. As I say, they have a right to operate cars at a high rate of speed and the rate of speed alone is not in and of itself negligence, but is to be determined in the light of all of the circumstances surrounding the case. The motorman in approaching the highway crossing had a right to believe that any person intending to use the highway for the purpose of crossing the track, would use reasonable care and caution to ascertain and determine whether or not a car was coming. It appears from the testimony in this case that the car, the car upon which the plaintiff was riding, if going at the rate of 50 miles an hour could not be stopped in less than 950 or 1,000 feet and that when going faster more distance would be required to make the stop. After you have determined the rate of speed at which the car was going, you will then have to determine the distance from the crossing that the motorman had a view of the same, and if you believe from the evidence that the length of view was sufficient to enable the motorman to stop his car so as to avoid striking any obstacle which was on or in dangerous proximity to the track at the time the observation was made, and that no such obstacle was on or in dangerous proximity to the track at such time, then I charge you, gentlemen of the jury, that the motorman had the right to continue on toward the

crossing without slackening speed, in reliance on the belief that no one would proceed on or near the track until his car had passed the crossing, and if on reliance in such belief, the motorman got so near the crossing before he saw, or by the exercise of a high degree of care, he should have seen the danger, that it was practically and physically impossible for him to stop his car, then he would not be negligent and plaintiff could not recover against the railway in this case. If the jury believe that the motorman saw or should have seen the driver of the traction engine when he went on or approached the track, if they believe the driver did so, the motorman had a right to believe and to act upon the belief that the driver would not undertake to drive his train on or over the track until the car had passed the crossing, and if the motorman saw or should have seen the traction engine standing still at a safe distance from the track, he had a right to believe that it would remain stationary and that it would not be driven upon the track before the car passed the crossing. The motorman under such circumstances could not be required to check or slacken the speed of his car in anticipation of any act of control of the engine which would cause it to leave a place of safety and go into a place of danger in or near the track ahead of the car, and if while so operating his car he got so close to the crossing before he saw, or should by the exercise of due care and caution have seen that the engine was proceeding toward the track, as to make it impossible to stop the same by the use of every possible means and device at hand before striking the engine, then I charge you, gentlemen of the jury, that the motorman could not be held to have been guilty of any negligence and the plaintiff could not recover against the railroad company.

"In approaching a crossing the duty rests upon the person operating a car to give warning. * * *

"I think I have already in the other requests which I have given or charges which I have made, covered the fourth request asked for by the defendant. Now, gentlemen of the jury, if the track was clear and there was nothing in the situation, position or movement of the road roller to suggest danger to the motorman

until such time as he got so close to the crossing as to render it physically impossible to stop before reaching it, the speed of his car considered, provided you find that such speed was the proper speed under all of the circumstances surrounding the operation of the car, then the motorman would not be held negligent in failing to stop his car in time to avoid the collision, and neither would the speed of his car, if lawful and proper before the obstruction, or danger became apparent, be rendered negligent and improper by reason of the fact that he could not stop the car in the distance intervening. * * *

"Now, as you have heard, there is a dispute as regards the responsibility in this case. It is as you know, the duty of the plaintiff himself to assume the burden of proof to show the acts of negligence upon the part of either one or both defendant companies. The form of your verdict in this case, unless the plaintiff has satisfied you by a fair preponderance of evidence that this accident was caused by negligence on the part of either one of the defendants, would be no cause of action. If you find that it was caused by an act of negligence upon the part of either one of these defendants you will so indicate by finding a verdict in favor of the plaintiff and against either one of the defendants that you find is liable therefor under the rules of law which I have pointed out, or against both of them, if you find that they are both negligent in the operation of those vehicles at the time in question. Now, if you find that this damage was caused by an act of negligence on the part of either one solely, you are so to indicate and find a verdict in favor of the plaintiff against that defendant that you find to be negligent and if you find the other defendant was not negligent you will find a verdict of no cause of action or not guilty as against that defendant. You can find a verdict for the plaintiff as against either of the defendants or against both of them, but you cannot find separately. If you find against both of them you cannot separate the responsibility. If you find from the evidence in this case that both defendants were guilty of negligence, which proximately caused the accident in question, then you will find for the plaintiff against both of the defendants and award the plaintiff such

sum as against both of the defendants as you find from the evidence he has suffered by reason of the accident. But there can be no separation or degree of liability, as to the two joint defendants. If both have been guilty of the negligence which you find from the testimony, your duty will be to return a verdict in such sum as you believe will fully compensate the plaintiff for the injuries received and the damages he has sustained, but it must be one verdict as against both of the defendants. If you find for the plaintiff, you will, of course, assess the amount of his damages. If you find that one—that the negligence of one of these defendants was the proximate cause, as I stated before, and that the other defendant, through its agent did not commit an act of negligence which was the proximate cause of the accident, then you will return against that defendant in such a sum as you find the plaintiff has been damaged by reason of the accident the amount which you find to be his damages and against the other defendant which you find is not guilty, no cause of action. I trust I have made myself clear upon that point. * * *

"*The Court:* My attention has been called to certain testimony given in this case with regard to the operation by the defendant, the Good Roads Construction Company, of the roller at the time in question. I find that the testimony is undisputed that there was but one person upon the roller; that there was no pilot upon the road roller as required by the statutes of this State. The statute of this State requires that a steam engine of this kind must have, in operating upon a public highway, must send ahead a person to give warning of the approach of a vehicle, that the lack of this constitutes negligence. That testimony is undisputed. Therefore, gentlemen of the jury, I charge you that the act of the driver of the roller, was an act of negligence as a matter of law in the operation of that road roller without a pilot as required by the statute in this State. I think that covers the principles that are applicable to the case and you may follow an officer."

A careful examination of that portion of the charge first above quoted convinces us that the substance of

the fourth request to charge was fully covered in the charge as given. The court gave the fifth request verbatim, but interpolated the words:

"provided you find that such speed was the proper speed under all the circumstances surrounding the operation of the car,"

as appears from the second excerpt above set out. We are of opinion that the qualifying language was proper under the evidence introduced and the issue presented.

Error is assigned upon that portion of the charge in which the court said:

"In approaching a crossing, the duty rests upon the person approaching to give warning,"

—and in this connection it is asserted that at the time the accident occurred there was no statute covering the subject and that therefore at most the question of whether a warning should have been given was one of fact for the jury. We cannot agree with counsel for appellant in this claim. In operating a heavy motor car at a rate of 50 or 60 miles per hour there would surely rest upon the company the common law duty to give notice of its approach to a crossing. The whole tenor of the charge is such as to impose upon the defendant the duty only to:

"furnish its road and run it in the customary manner which is found to be safe and prudent,"

and to exercise:

"that degree of care required to be received by passengers upon steam railroads."

We are of opinion that no error was committed by the court in the use of the language to which exception was taken.

Error is assigned upon the third excerpt of the charge above quoted. The criticism of this portion of the charge is that the language was, "unhappy and

confusing to the highest degree." This view is not so apparent to the court as it is to counsel. A former verdict was set aside because of an attempt on the part of the jury to apportion the damages between the two defendants and the court apparently took extra precautions to avoid such an error on the part of the jury on the second trial. We do not think the jury could have been misled by what was there said. It is true that the last excerpt above quoted tells the jury that the defendant Good Roads Construction Company is guilty of negligence as a matter of law. Had the court had this fact in mind when delivering that portion of the charge to which exception is taken it is likely that a somewhat different instruction would have been given, and one to the effect that the plaintiff must recover in any event against the Good Roads Construction Company, and could only recover against both defendants in case the railroad company was found to be negligent. Taking the instructions together, however, we are impressed that the question of the negligence of the railroad company was the important question for the determination of the jury, and that that was submitted under instructions entirely fair to that defendant.

Error is assigned on the refusal of the court to set aside the verdict for various reasons and among others that the verdict was excessive. When the case was in this court before under the record as it then stood, a majority of the Judges sitting were of opinion that a verdict for $10,000 was excessive. At the time of plaintiff's injury he was in his 77th year and had an expectancy of life of about 5½ years. At the time of the last trial in 1917, which was nearly eight years after his injury, he was about 84 years of age and still had an expectancy of life of upwards of 3 years. Aside from the fact that the record upon this trial, on the question of earnings, is fuller than that

upon the first trial, it is apparent that plaintiff by continuing to live far beyond his expectancy, according to the mortality tables, has demonstrated his right to recover for pain and suffering endured, at least up to the date of the last trial. Under the evidence in the record as it now stands upon the question of earnings and because of the lapse of time between the accident and the trial here under consideration, we are unable to say that the damages awarded are excessive.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

INDEX.

AFFIDAVITS—See CRIMINAL LAW (6).

AGENCY—See PRINCIPAL AND AGENT.

AGGRAVATION OF INJURY—See MASTER AND SERVANT (19).

AGREEMENT FOR SUPPORT—See SPECIFIC PERFORMANCE (4).

ALIMONY—See DIVORCE (1, 3, 4, 6, 8, 9).

AMENDMENTS—See APPEAL AND ERROR (4); ATTACHMENT (1, 2); CORPORATIONS (6); SPECIFIC PERFORMANCE (3); STATUTES (3); WAREHOUSEMEN (2).

APPEAL AND ERROR.

1. Under section 15, chap. 18, of the judicature act (3 Comp. Laws 1915, § 12587), errors based upon exceptions that findings of fact are against the weight of the evidence are reviewable by the Supreme Court. *American Ins. Co. of Newark* v. *Martinek*, 108.

2. Where plaintiffs claimed upon the trial that the contract was unambiguous and should be interpreted by the court, which view was accepted by the court, they refused the benefit of any admission of defendant in its answer that evidence should be admitted to explain the writing, which evidence it is now claimed would have shown that the cost of construction was much more than that allowed by the trial judge. *Waters* v. *Lakewood Utilities Co.*, 166.

3. A claim that under the holdings of the Federal courts, in an action for freight charges, the shipper cannot maintain set-off for damage claims, the court below was in error in allowing set-off for cost of constructing side track against demurrage charges, will not be considered by the Supreme Court, on error, where there is no exception referred to which raises the point, and no specific assignment of error. *Id.* 167.

4. Where a variance between pleadings and proofs, in a cause that had twice been tried, was first raised in defendants' requests to charge, the objection came too late, since if raised at the proper time the question of plaintiff's right to amend would then have been presented. *Willett* v. *King*, 296.

5. The refusal of the court below to submit special questions, none of which was controlling, was not erroneous. *Cohn-Goodman Co.* v. *People's Savings Bank*, 307.

6. Where plaintiff's evidence warranted a directed verdict in its favor without receiving in evidence a deposition of its president, any error in its reception becomes unimportant. *Id.* 308.

7. Under the provisions of the judicature act (section 62, chap. 18, Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12634) and Circuit Court Rule No. 66, there are three possible stages contemplated in connection with the allowance of time for settling bills of exceptions: (1) A party

CANCELLATION OF INSTRUMENTS—Continued.

6. Where defendant husband, in partnership with his son, sold his interest in the business to the son, the latter assuming a certain debt as part of the consideration of the purchase, but failed to pay the debt, defendant never having been released by said creditor, and the wife voluntarily gave a mortgage on property which she owned to satisfy said debt, without taking an assignment of the demand against the husband, the mortgage is valid in the hands of the latter, to whom it was assigned, and the wife cannot maintain a bill to have the same annulled, no duty, no enforceable equity in the premises, arising from the marital relation, and plaintiff is in the same position she would be if she were not the wife of defendant. *McGrath* v. *McGrath*, 615.

CANCELLATION OF POLICY—See INSURANCE (1-3).

CARRIERS.

1. The enactment of Act No. 300, Pub. Acts 1909 (2 Comp. Laws 1915, § 8109 *et seq.*), regulating common carriers and prohibiting unjust discrimination among shippers, rendered void a contract between a railway company and a lumber company whereby the railway company agreed to furnish cars for unlimited time free from demurrage charges, although said contract was lawful at the time it was entered into. *Grand Rapids, etc., R. Co.* v. *Cobbs & Mitchell*, 133.

2. Said act cannot be said to impair the obligation of a contract within the constitutional inhibition, since it was entered into with the knowledge that the State, in the exercise of its police power, could pass laws regulating common carriers within its borders, and the hands of the State in the exercise of this power may not be tied by private contract. *Id.* 134.

3. In an action for demurrage charges subsequent to the passage of the act, the railway company was entitled to recover, since the contract was void; and defendant could not recoup its damages for the breach of an unenforceable contract. *Id.*

4. Where the relation of railroads is one of co-operation merely, they are entitled to have sustained a joint rate and a reasonable charge for switching service. *Pontiac, etc., R. Co.* v. *Michigan Railroad Commission*, 258.

5. The corporate organization and affairs of the Pontiac, Oxford & Northern Railroad Company being controlled by the Grand Trunk Western Railway Company, although the independent organization of the first named road was maintained, they must be regarded as identical for the purpose of rate making, so that switching charges between them were properly eliminated by order of the Michigan railroad commission. *Id.*

6. A person who enters a train and refuses to pay his fare

CONTRACTS—Continued.

case no gas was used and the occupant wished to retain the meter he should pay 75 cents per month minimum charge, *held*, no authority to charge a minimum rate of 75 cents per month where gas was used. *Id.*

9. Where the franchise fixed the rates for gas, the reasonableness of a proposed minimum rate in violation thereof will not be considered by the courts. *Id.*

10. Where the subject-matter of a contract involves a question of individual taste or sentiment rather than of utility, the good faith of the party declaring his dissatisfaction cannot be inquired into; but where the subject-matter of the contract relates to a thing which is ordinarily desirable only because of its commercial value or of its mechanical fitness, it is held that the party must act in good faith and must be honestly dissatisfied. *Morehead Manfg. Co.* v. *Alaska Refrigerator Co.*, 543.

11. In an action by plaintiff on a written contract for certain material furnished for installation in defendant's factory, guaranteeing that the system sold will "handle all of our exhaust steam and all of our live steam that we use for heating purposes throughout the dry kilns and entire plant, * * * making a saving of 5 per cent. in fuel daytimes and 20 per cent. increase of heat in daytimes on the fans, * * * reduce the back pressure on the engine one-third," and agreeing that if the equipment does not do the work as guaranteed plaintiff will remove the same without expense to defendant, on conflicting testimony the question of whether defendant arbitrarily and in bad faith asserted dissatisfaction and refused to accept and pay for the equipment which in fact came up to the guaranty, because through information furnished by plaintiff's agent defendant could get the desired results without it, was a proper question for the jury. *Id.*

12. The court below was not in error in excluding a book containing a record of temperatures taken two years before, where no record was kept for the intervening period, nor any evidence offered that the condition and equipment of the plant was then the same as when the contract was entered into. *Id.*

13. An instruction by the court that the guaranty to "give 20 per cent. increase heat daytimes on the fans," meant not the temperature in the kilns, as defendant contended, but at the mouth of the tube or fans, *held*, not erroneous, since the sentence of simple words required no interpretation or evidence to determine its meaning. *Id.*

14. A letter signed by defendant's assistant manager, stating that certain instructions as to changes to be made had been given to defendant's engineer, and that the traps were then working O. K., keeping the system drained dry, was competent testimony for its bearing upon the issue, and upon defendant's claim that it was obtained by

DIVORCE—Continued.

9. Where, in divorce proceedings, the evidence shows that at the time of the marriage, defendant husband was 60 years of age and the wife 24, that they lived together about four and one-half years, during which time defendant's fortune was not materially increased by plaintiff's efforts, that the fair value of his real property was $30,000, and his personal $5,642, exclusive of household goods, an award to plaintiff of $5,000 in lieu of dower, household furniture of the value of $846, and taxable costs including an attorney fee of $350, will not be disturbed on appeal, as either unfair or inadequate, although defendant was guilty of extreme cruelty and adultery. *Id.*

DOUBLE AGENCY—See BROKERS (3-5).

DOUBLE IMPROVEMENTS—See TAXATION (12, 13).

DOWER—See DIVORCE (8, 9).

DRAINS—See CERTIORARI; EVIDENCE (4); TRIAL (8); WATERS AND WATERCOURSES.

DUTY TO RETURN PAYMENT—See VENDOR AND PURCHASER (7).

EJECTION FROM TRAIN—See CARRIERS (6-8).

ELECTION OF REMEDIES—See MASTER AND SERVANT (5).

ELECTRIC RAILROAD—See RAILROADS (3).

ELEMENTS OF OFFENSE—See CRIMINAL LAW (12).

EMPLOYEE—See MASTER AND SERVANT (9, 10).

EQUALLY GUILTY—See CRIMINAL LAW (8).

EQUITABLE LIEN—See ASSIGNMENTS (2); VENDOR AND PURCHASER (1-3).

EQUITABLE TITLE—See VENDOR AND PURCHASER (3).

EQUITY.

1. Before the rule that, having jurisdiction of subject-matter and parties for one purpose, a court of equity may retain jurisdiction to settle all disputes relating to the same subject-matter between the parties, has application, some ground of equitable jurisdiction must, in any case, be not only asserted, but established. *Sharon* v. *Fee*, 152.

2. A proceeding in chancery to foreclose a mechanic's lien is not one of general equity jurisdiction, but is wholly statutory. *Id.*

3. Because a court of equity is given jurisdiction, under the mechanics' lien law (3 Comp. Laws 1915, § 14796 *et seq.*), to foreclose a mechanic's lien, and may bring before it the claimants and owners and all contractors and mate-

EVIDENCE—Continued.

3. *Held*, error to refuse to allow defendant to show what it would have cost plaintiff to repurchase the stock within a reasonable time after he had knowledge of its wrongful sale. *Id.*

4. In an action for damages for injury to plaintiff's standing timber and crops by obstructing his natural drainage, evidence of farmers as to their individual experience with their own land to support the defense that the crop failure was due to unfavorable seasons, without laying the proper foundation of similarity, was inadmissible. *Crane* v. *Valley Land Co.*, 353.

5. The court will not take judicial notice of the fact that many large stores apparently owned and operated by one company have departments operated and controlled by entirely separate corporations. *Wine* v. *Newcomb, Endicott & Co.*, 446.

6. Testimony that an apparent employee of defendant was engaged in taking down some decorations in defendant's store, and had in his hand one end of the rope or cord over which plaintiff, a customer, tripped and was injured, was sufficient to warrant the inference that said person was an employee of defendant. *Id.*

See APPEAL AND ERROR (6); CONSPIRACY; CONTRACTS (12, 14); CRIMINAL LAW (1, 7, 15); DIVORCE (2); FRAUD (3, 8-12); LIBEL AND SLANDER (6, 9, 10); MASTER AND SERVANT (19); MECHANICS' LIENS (2); NEGLIGENCE (1, 6); PLEADING (2); PRINCIPAL AND AGENT; WAREHOUSEMEN (1).

EXCEPTIONS—See APPEAL AND ERROR (1, 3, 13).

EXCEPTIONS, BILL OF—See APPEAL AND ERROR (7-10).

EXCESSIVE VERDICTS—See DAMAGES (2, 6); LIBEL AND SLANDER (3).

EXCHANGE OF PROPERTY.

1. Where defendant dealt with property, received in an exchange of property, after discovering plaintiff's alleged false representations relating thereto, his conduct amounted to an affirmance of the contract, and the defense of fraud is not open to him in an action for its breach. *Hamburger* v. *Berman*, 78.

2. Where an exchange of properties was contracted for, *held*, the values fixed in the contract by the respective parties upon the properties were mere estimates, and were so fixed merely for the purpose of effecting an exchange. *Id.*

3. Where defendant contracted to convey certain property, the legal title to which was in a corporation of which he was a minority stockholder, in exchange for other property, he was liable in an action for breach of the contract, on his failure to convey. *Id.*

FORECLOSURE—Continued.

2. On appeal from the decree of the court below dismissing plaintiff's bill to set aside a mortgage foreclosure, in the absence of evidence of fraud, mistake, unfairness, or irregularity, the decree will be affirmed. *Id.*

See PARTIES.

FOREIGN JUDGMENTS—See BILLS AND NOTES (3); DIVORCE (5, 6); JUDGMENT (3).

FORFEITURE—See EQUITY (4); SPECIFIC PERFORMANCE (1-3); USURY (4); VENDOR AND PURCHASER (5).

FOUNDATION—See EVIDENCE (4).

FRANCHISES—See CONTRACTS (7-9).

FRAUD.

1. It was fraud for the holder of an option on real property to represent to prospective purchasers that he was the agent of the owner, and that the lowest cash price the owner would accept for the land was $15,000, when in fact he was not the agent of the owner, and the option fixed the price at $11,000. *Norris* v. *Home City Lodge No. 536, I. O. O. F.*, 90.

2. In order to furnish ground for judicial action, fraud and injury must concur. *Id.*

3. Where the defense to an action on a promissory note given as part of the purchase price of a piece of land was that plaintiff had fraudulently misrepresented to defendants the price which the owner was willing to take for the land, the question of the value of the land was immaterial. *Id.* 91.

4. Where the theory of the defense was that two of the defendants, who had also signed the note, had conspired with plaintiff to deceive and mislead the other defendants, an instruction that plaintiff's failure to call the two defendants to the witness stand might be regarded by the jury as a badge of fraud unless explained, was error. *Id.*

5. A statement of the assets and liabilities of a corporation made to a prospective purchaser of stock of the corporation not authorized by the corporation, signed by defendant, *held*, to be the signature of defendant personally, and not that of the corporation, although he added the words "secretary and treasurer" after his name. *Andrews* v. *Osius*, 195.

6. Where the stock of the corporation, which was largely a family affair, was practically owned by defendant and his wife, and was controlled by defendant, section 11983, 3 Comp. Laws 1915, providing that no action shall be brought to charge any person by reason of favorable representation concerning the character, credit, etc., of any other person unless such representation be in writing,

INJUNCTION.

Defendant, a boom company incorporated in both Michigan and Wisconsin, operating on the Menominee river, sued plaintiff, a Michigan corporation, in the Wisconsin courts, to recover boomage and rafting charges upon logs delivered during the seasons of 1908 to 1913, inclusive. Plaintiff answered, setting up alleged excessive charges under the Wisconsin statute upon logs delivered during 1904-1907, by way of counterclaim, to which defendant pleaded the statute of limitations. While said suit was pending plaintiff filed its bill to enjoin defendant from further prosecuting its action in the Wisconsin suit, alleging that its counterclaim is barred in Wisconsin but is not barred in Michigan. *Held*, that plaintiff had failed to show excessive charges for booming and rafting when proper allowance was made for sorting its logs and other legal charges, and that there were no such compelling equities requiring the court to break over the rule of comity and policy which forbids the granting of an injunction to stay proceedings in a suit already begun in a court of competent jurisdiction of a sister State. *J. W. Wells Lumber Co.* v. *Menominee River Boom Co.*, 14.

INSURANCE.

1. When instructed so to do, it is the duty of an insurance agent to cancel a policy of insurance issued by him, and if he fails to cancel he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow his instructions. *American Ins. Co. of Newark* v. *Martinek*, 108.

2. In an action by an insurance company against its agent for a loss occasioned by the neglect or refusal of the agent to cancel a policy after repeated instructions to do so, where letters in evidence from plaintiff to defendant showed that plaintiff assumed that the policy had been canceled and that the agent had merely neglected to return it to plaintiff as instructed to do, and the agent did not inform plaintiff to the contrary, a finding by the

JOINT TENANCY.

1. Joint tenancy in personal property with its right of survivorship does not exist in this State. *Ludwig* v. *Bruner*, 556.

2. Where a husband and wife, on the sale of a farm held by them by the entireties, took a purchase money mortgage "as joint tenants," the husband as survivor of his wife did not take title to her interest in the mortgage, in the absence of testimony tending to establish a gift *inter vivos* or one *causa mortis*. *Id.*

See BANKS AND BANKING (3).

JUDGMENT.

1. The determination in a suit by a wife for personal injuries that the defendant was negligent, and the plaintiff free from negligence, is not conclusive upon defendant in a suit brought by the husband against the same defendant, for damages arising out of the same circumstances. *Laskowski* v. *People's Ice Co.*, 186.

2. It is the general rule that judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation. *Id.*

3. In a suit upon a foreign judgment, that judgment may be impeached for lack of jurisdiction in the foreign court, irrespective of the recital of jurisdiction contained in the record of judgment. *Smithman* v. *Gray*, 317, 327.

4. A warrant of attorney to confess judgment contained in a promissory note must be strictly construed. *Id.*

5. Under the later decisions of the Pennsylvania courts, a warrant of attorney to confess judgment couched in unlimited terms may be exercised in favor of the assignee. *Id.*

See BILLS AND NOTES (3, 4); INDEMNITY (1).

JUDICIAL NOTICE—See EVIDENCE (5).

JURISDICTION—See CANCELLATION OF INSTRUMENTS (5); CERTIORARI (1); EQUITY (1-3, 5); JUDGMENT (3); MECHANICS' LIENS (1); PARTIES.

JUSTIFICATION—See LIBEL AND SLANDER (4).

LABELING—See CRIMINAL LAW (11).

LAND CONTRACTS—See BROKERS; EQUITY (4); HOMESTEAD; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER (4-8).

LANDLORD AND TENANT—See VENDOR AND PURCHASER (5).

LEADING QUESTIONS—See CRIMINAL LAW (1).

LIABILITY FOR DEBTS—See CORPORATIONS (2, 3).

MASTER AND SERVANT—Continued.

4. An injury to an employee resulting from a risk common to the general public is not covered by the workmen's compensation act. *Id.*

5. Under section 15, part 3, of the workmen's compensation act (2 Comp. Laws 1915, § 5468), an injured employee must make an election, and he cannot proceed against his employer for compensation and also against a third party, the wrongdoer, for damages. *Vereeke* v. *City of Grand Rapids*, 85.

6. Under the same section, when an employer pays compensation he is empowered to recover such sums as he pays from the wrongdoer for his own benefit. *Id.*

7. But the only limitation under said act upon the right of a dependent who accepts compensation from an employer is to release said employer from all claims or demands at law, if any, arising from such injury; and it cannot be contended that a dependent, by accepting compensation from an employer, thereby releases the wrongdoer from liability in an action for the benefit of heirs at law or creditors of a deceased employee. *Id.*

8. Where a city employee was accidentally killed, and the mother made a claim and was awarded compensation as a dependent under the workmen's compensation act, thereby clothing the city with a right of action against the wrongdoer, and the city failed to prosecute its right of action under section 15, part 3, of said act, it could not, by petition to the industrial accident board, have credited upon the award against it any sums received by the mother as a result of a suit brought by the administrator of the deceased son's estate against the wrongdoer. *Id.* 86.

9. Under the provisions of section 11, Act No. 285, Pub. Acts 1909, as amended (2 Comp. Laws 1915, § 5332), prohibiting the employment of any male under the age of 18 years in any hazardous employment, where a boy has not attained the age at which he may lawfully be employed in the occupation or work in which he is injured, he cannot be regarded as an employee, within the provisions of the workmen's compensation act. *Kruczkowski* v. *Polonia Publishing Co.*, 211.

10. A valid contract of employment in the work in which the minor was injured is essential in order that such person may be an "employee" under the workmen's compensation act. *Id.*

11. *Held*, that children who are unlawfully set at work in hazardous employments and are injured therein, without fault or negligence on their part, should have the benefit of a common-law action against the wrongdoer, where the defenses of assumption of risk and negligence of a fellow servant are not available to a defendant. *Id.* 212.

PLEADING.

1. Where plaintiff's declaration alleges that he was a passenger on defendants' train, but his proofs show that he was a trespasser, there is a variance between pleadings and proofs. *Willett* v. *King*, 296.

2. In an action on a certificate of deposit, where plaintiff was allowed to trace the money and to show whose money was deposited and the circumstances of the transaction, there is no merit in the contention that plaintiff was allowed to ignore its bill of particulars which stated the cause of action consisted of a certificate of deposit, a copy of which was set forth in the declaration, since there was no effort to change the terms of the certificate which did not state that the money belonged to the one depositing it, or that it was payable to him in any contingency. *Cohn-Goodman Co.* v. *People's Savings Bank*, 307.

See BILLS AND NOTES (3); CORPORATIONS (6); EQUITY (1, 5); FRAUD (8); NEW TRIAL (2); SPECIFIC PERFORMANCE (3); TRIAL (9); VARIANCE.

POLICE DEPARTMENT—See MUNICIPAL CORPORATIONS.

POLICE POWER—See CARRIERS (2).

POWERS—See INSURANCE (6).

POWERS OF COUNTY BOARD—See PLATS (1).

PRESUMPTIONS—See STREET RAILWAYS (4); TAXATION (7).

PRICE—See FRAUD (1).

PRINCIPAL AND AGENT.

1. While it is not competent to show statements and admissions of an agent to establish his agency, he may testify to the fact of his agency; he being as competent upon that question as the principal would be. *Livesay* v. *East Side Creamery Co.*, 336.

2. Evidence, although conflicting, *held*, sufficient to sustain the finding of the trial court that agency was established. *Id.*

3. *Held*, that the verdict was not against the weight of the evidence. *Id.*

See BROKERS; INSURANCE (1-3); USURY (3).

PRIVILEGE—See LIBEL AND SLANDER (1, 7).

PROCEDURE—See STATUTES (3).

PROCESS.

1. A nonresident, charged with crime and brought within the jurisdiction of the court by compulsory process, is exempt from service of civil process while coming into the jurisdiction, while necessarily in attendance upon court,

STENOGRAPHER'S CERTIFICATE—See APPEAL AND ERROR (8).

STOCK AND STOCKHOLDERS—See CORPORATIONS; DAMAGES (1); ESTOPPEL; EVIDENCE (1).

STREET RAILWAYS.

1. Where plaintiff stopped his automobile before crossing defendant's street car track, and looked, and there was no street car within 250 feet, the range of view, he was not guilty of contributory negligence, as a matter of law, in proceeding to cross, when he was struck and injured by defendant's car. *Reichle* v. *Detroit United Railway*, 276.

2. Where plaintiff, after he saw that a collision was inevitable, elected to receive a glancing rather than a direct impact, by turning to the right instead of continuing across, he was not as a matter of law, guilty of contributory negligence. *Id.*

3. Whether plaintiff stopped his car so far back as to make looking useless as a precaution, or whether he was careless and negligent in his observations were questions of fact for the jury. *Id.*

4. Plaintiff had a right to assume that if a street car were approaching at or beyond the 250-foot view, it would not be operated over and across a much traveled street at a speed in excess of 30 miles an hour. *Id.*

5. In an action against an interurban electric railway company for damage to plaintiff's automobile, caused by a collision with defendant's car, on a public highway at the entrance to a park, which was well lighted, evidence that after the engine of the automobile was stalled while making the crossing, it was there for 10 or 20 minutes before being struck, and that a friend who was assisting to extricate the machine ran down the track about 75 feet and swung his arms, but the motorman paid no attention to him, raised a question for the jury as to whether the driver of the automobile was guilty of contributory negligence in failing to make greater effort to warn the motorman. *Fischer* v. *Michigan Ry. Co.*, 668.

6. The rule that it is the duty of a motorman on an electric car to have the car under such control as to admit of its being stopped after he became able to discover an object on the track and before a collision with such object should occur, applies to interurban railways as well as to city street cars. *Nissly* v. *Railway Co.*, 168 Mich. 676. *Id.*

7. Where the motorman testified that the speed of his car was such that it could not be stopped within the range of his vision, defendant was guilty of negligence as a matter of law. *Id.*

See TRIAL (7).

SUBSCRIPTIONS FOR STOCK—See CORPORATIONS (2).

TAXATION—Continued.

insufficient to warrant the presumption that she was deceased. *Id.*

8. Under Act No. 9, Pub. Acts 1882, amending the tax law requiring assessing officers to follow the government description of land, and allowing it to be assessed by any description by which it might be known, land described in a way that could have been easily understood by the owner was a valid description. *Id.*

9. The rule preventing a husband from purchasing a tax title upon land of his wife is not applicable where the wife had been dead for three years, and the title had descended directly to her daughter. *Id.*

10. The record holder of a tax deed for the taxes of an earlier year is entitled to notice of redemption from a subsequent tax title purchaser. *Id.* 347.

11. Under section 140 of the tax law (Act No. 142, Pub Acts 1905), in force at the time service of notice to redeem was made by the sheriff by registered letter, providing for filing by the sheriff of receipts received for such letters with his return, where the receipt received by the sheriff and filed was signed, not by defendant, to whom the letter was sent, and who denied receipt of notice, but by a stranger, *held*, that the service was insufficient. *Fowler* v. *Stubbings*, 383.

12. Where the common council of the city of Grand Rapids complied with the requirements of its charter and the provisions of the several special acts authorizing the building of a trunk sewer, and the erection of a flood wall, each improvement being paid for out of funds as provided in said special acts, there is no merit in the contention that there was a prohibited double improvement under a single assessment, although to save expense both improvements were carried along at the same time, by the same contractor, and under the same contract. *McKee* v. *City of Grand Rapids*, 527.

13. If there was any irregularity in this particular, plaintiffs are estopped from raising it by their conduct in standing by and seeing these public improvements going on without legal protest, and in failing to mention it in their appeal from the board of assessors to the common council under the charter provision requiring the grounds of appeal and matters complained of to be stated in writing. *Id.*

14. The determination of municipal officers, in whom discretion is vested to decide upon assessment districts and levies of assessments, is conclusive in the absence of mistake or abuse of discretion amounting to fraud. *Id.*

15. Under the charter of the city of Grand Rapids (Act No. 593, tit. 6, § 45, Local Acts 1905), any mistake or fraud in such proceedings may be reviewed in chancery and corrected where clearly shown. *Id.* 528.

TRIAL—Continued.

4. For defendants' counsel to exclaim, on plaintiff's reply to a question, "What a liar you are!" was highly prejudicial and was not cured by an admonition by the court to the jury to pay no attention to such remarks, especially as counsel exclaimed further, "For a man to sit there and tell me that!" which was tolerated without further reprimand. *Id.*

5. In an action for personal injuries by a servant against his employer, who was not operating under the workmen's compensation act, the defenses of assumption of risk and contributory negligence not being available (2 Comp. Laws 1915, § 5423), it was error for the court below to instruct the jury that plaintiff must bear the consequences of all ordinary risks incident to his employment, although he had previously instructed them in accordance with the law. *Id.* 243.

6. In an action for personal injuries, where the negligence charged was that the place where the plaintiff was required to work was rendered unsafe by and in connection with the unsafe condition of the equipment and machinery, an instruction that "defendants were under no legal obligation to provide a guard, screen, or cover for this buzz-saw, if there was sufficient room to carry on the work with ordinary safety," was erroneous, since the work was done in the open and the question of sufficient room was not involved. *Id.*

7. In an action against a street railway company for personal injuries caused by a collision between defendant's car and plaintiff's automobile, an instruction that "it is likewise the duty of the railway * * * to exercise reasonable care 'and' to provide those things that will * * * insure * * * the safety of the public," it being in dispute whether the word "and" was used, *held*, that even if used, the meaning was made clear by the context. *Reichle* v. *Detroit United Railway*, 277.

8. In an action for damages caused by the construction of a dyke, where defendant emphasized the fact that plaintiff was refused a temporary injunction, plaintiff was entitled to have the jury instructed, as requested, that the granting or not granting of a temporary injunction is no ground for action or defense. *Crane* v. *Valley Land Co.*, 354.

9. Where a charge in the declaration that one of the defendants debauched the infant daughter of plaintiff was stated by way of inducement to the principal subject of the count, which alleged a "conspiracy of all the defendants to wrong the plaintiff by falsely charging him" with compounding a felony, a case of debauchery was not in issue, and it was reversible error for plaintiff's counsel, throughout the trial, against objections of defendants' counsel, to persistently inject the issue of the debauchery, al-

TROVER.

An action of trover will lie against the former manager of a bankrupt corporation, at the instance of the trustee in bankruptcy, for money belonging to the corporation which he unlawfully retains, after it has been demanded. *Moore* v. *Andrews*, 220.

TRUSTEE IN BANKRUPTCY—See CONTRACTS (6).

TWO LIVES IN BEING—See WILLS (3).

UNDIVIDED INTEREST—See ATTACHMENT (3).

UNDUE INFLUENCE—See CANCELLATION OF INSTRUMENTS (1, 3).

USE OF HIGHWAY—See HIGHWAYS AND STREETS.

USURY.

1. A mortgage executed by plaintiff and his wife bearing interest at 6 per cent., and providing in addition thereto that the mortgagors should pay all taxes and assessments levied upon the lands or upon or on account of the mortgage or the indebtedness secured thereby; and it appearing that the mortgagee paid taxes upon its personal estate at the rate of over 2 per cent., *held*, usurious. *Union Trust Co.* v. *Radford*, 176 Mich. 50. *Dalton* v. *Weber*, 455.
2. A mortgage calling for $10,000, while the amount actually paid to and received by the mortgagors was only $7,165.19, *held*, usurious. *Id.*
3. Where the loan was made by defendant's attorney in fact, and it is undisputed that the bonus claimed by plaintiffs was exacted, the court will not infer that the exaction was for the sole benefit of the agent, in the absence of evidence that the principal did not benefit by it. *Id.*
4. On a bill by the mortgagors to redeem from foreclosure by advertisement of a usurious mortgage, equity will require them to pay the legal rate of interest, since to remit the interest would amount to forfeiture; the proceeding not being one by the usurious lender seeking to enforce usury. *Id.*

VALUE OF LAND—See FRAUD (3).

VALUES—See EXCHANGE OF PROPERTY (2, 4).

VARIANCE.

Where the case was submitted to the jury upon a theory wholly at variance with the theory of the declaration, the judgment of the court below will be reversed. *Droppers* v. *Marshall*, 173.

See APPEAL AND ERROR (4); PLEADING (1); TRIAL (1).